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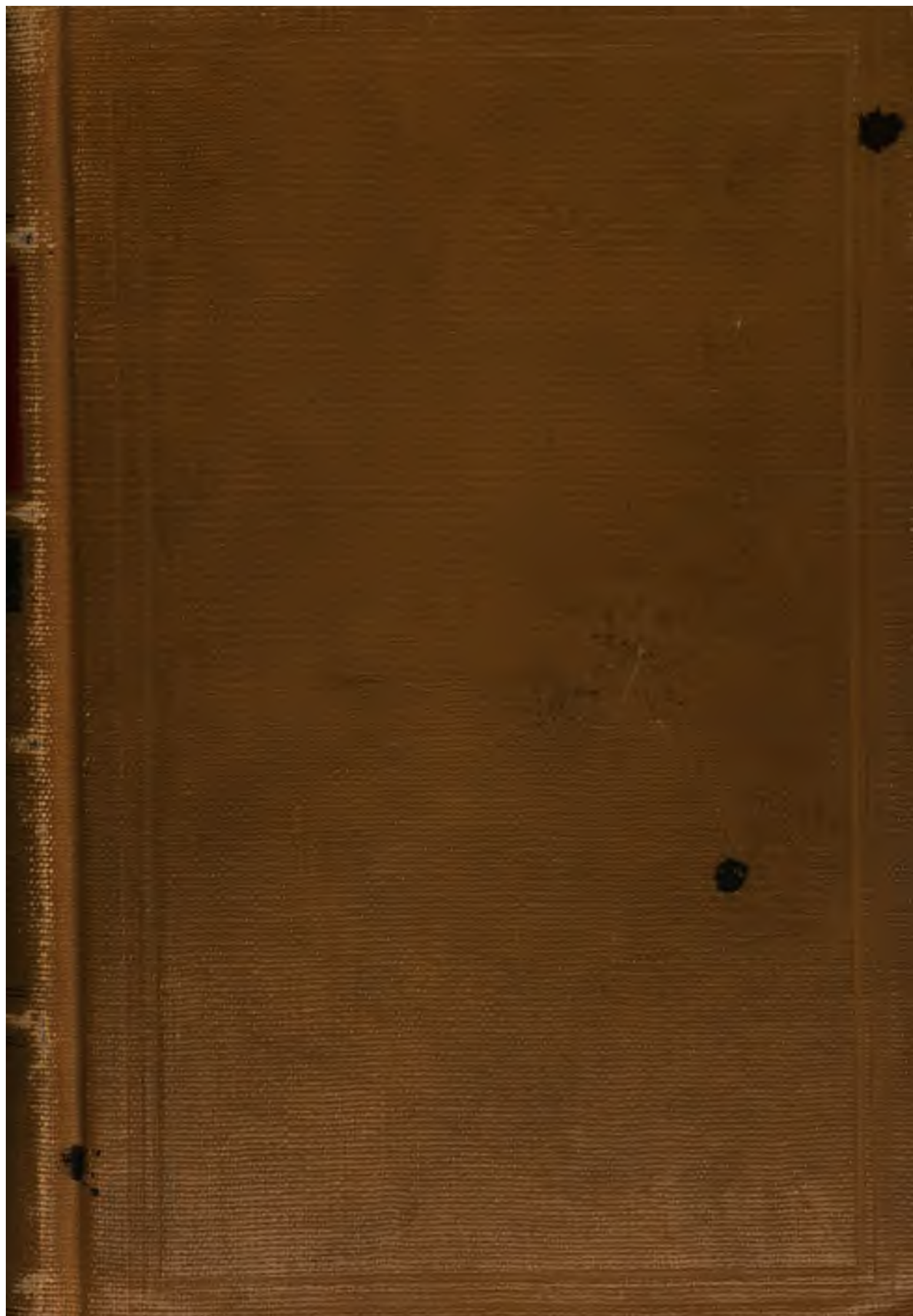
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CHILDS' SURETYSHIP.

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## PREFACE.

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THE aim of this work is to present the principles of the modern law of Suretyship completely and correctly, in a concise and systematic form, for the use of the practitioner and student. At a very early period in the world's history it was found that complete trust could not be placed in human beings, and, therefore, that security was desirable; hence, this is one of the oldest branches of the law, and has engaged the attention of the courts from an early date. In the Book of Proverbs, eleventh chapter and fifteenth verse, it is written, "He that is surety for a stranger shall smart for it; and he that hateth suretyship is sure," which shows that prior to the year 1000 B. C. it had been discovered that undesirable consequences were liable to result to one who entered into the relation. The hostages given in ancient times to secure the performance of treaties were, in a sense, sureties who answered for a default, not with their property, but with their lives. With the growth of the credit system, contracts of suretyship have become more common and important, and the numerous rights involved make the subject a very technical one.

The names of cases which are to be found in collections of cases on this subject are printed in the notes in capital letters.

F. H. C.

Chicago, June, 1907.



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# HANDBOOK OF SURETYSHIP AND GUARANTY.

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## CHAPTER I.

### DEFINITIONS, PARTIES, DISTINCTIONS, AND CLASSIFICATIONS.

- 1-11. Definitions of Suretyship, Guaranty, and Parties Thereto.
- 12. Distinctions between a Surety proper and a Guarantor.
- 13. Distinctions between a Surety proper and an Indorser.
- 14. Distinctions between a Guarantor and an Indorser.
- 15. Distinctions between a Surety and an Insurer.
- 16. Distinctions between Guaranty and Warranty.
- 17-22. Classification of Suretyship.
- 23-34. Classification of Guaranties.

#### DEFINITION—SURETYSHIP—BROADEST SENSE.

1. Suretyship, in its broadest sense, is the relation occupied by a person liable for the payment of money or for the performance of an act by another, such liability being collateral as to such other person, and who is liable to suffer loss in event of the failure of such other person to pay or perform, but whose liability is terminated at once, fully and completely, if such other person does pay or perform.

#### SAME—SURETY—BROADEST SENSE.

2. A surety, in the broadest sense, is the person collaterally liable for such payment or performance by another.<sup>1</sup>

<sup>1</sup> In *SMITH v. SHELDEN*, 35 Mich. 42, 24 Am. Rep. 529, a surety is said to be "a person who, being liable to pay a debt or perform



**SAME—SURETYSHIP—TECHNICAL SENSE.**

3. Suretyship, in its narrower sense, is a legal relation, based upon contract between competent parties, in which one person undertakes, as the object of such contract, to answer to another for the debt, default, or miscarriage of a third person; the third person's liability to the second person being thus similar to that of such first person.

**SAME—SURETY—RESTRICTED SENSE.**

4. A surety, in the narrower sense, is the person who undertakes, by an express contract for that very purpose, to become liable for the debt, default, or miscarriage of another; the effect of the contract being that the liability of the latter is similar to that of the surety.

**SAME—GUARANTY.**

5. A guaranty is an undertaking that another person will pay a debt or perform a duty; such other person being primarily liable for such payment or performance.

**SAME—GUARANTOR.**

6. A guarantor is the person who undertakes that another will pay or perform.

**SAME—PRINCIPAL.**

7. The principal is the person primarily liable upon a contract of suretyship.

an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought to have made payment or performance before the surety was compelled to do so." See, to the same effect, *Wendlandt v. Sohre*, 37 Minn. 162, 33 N. W. 700.

"Surety" is a word of two syllables only, but frequently being mispronounced as if containing three.

**SAME—CREDITOR OR OBLIGEE.**

**8. The creditor or obligee is the person who can enforce payment or performance by the principal and surety.**

*Suretyship.*

Suretyship,<sup>2</sup> in its broadest sense, exists in every instance where there is one person primarily liable for the payment of money or for the performance of some act, and a second person, as between himself and the one primarily liable, expects to pay or perform in event of the failure of the other to do so, although his expectation as to the one primarily liable cannot affect his liability to the person having the right to enforce such liability. In every instance of suretyship, upon payment or performance by the principal, all liability on the part of the surety at once ceases; whereas payment or performance by the surety, while discharging the debt or duty so far as the creditor is concerned, still leaves an obligation upon the part of the principal to reimburse the surety.<sup>3</sup> This collateral liability of the surety may be said to be the essence of the relation.

Suretyship, in its broadest sense, includes suretyship in its narrower sense. A surety in the narrow sense, a guarantor,<sup>4</sup> an indorser,<sup>5</sup> the drawer of an accepted bill of exchange,<sup>6</sup> and accommodation parties,<sup>7</sup> are all sureties in the broadest sense, as is a person who mortgages or pledges his property to secure another's debt, but without incurring personal liability;<sup>8</sup> while a surety in the narrow and technical sense is one who makes

<sup>2</sup> In the civil law of the province of Quebec, suretyship in connection with a negotiable instrument is called an "aval." *Paterson v. Lynch*, 1 Low. Can. 219. In Scotch law, suretyship is known as "cautionry." *Black's Law Dict.* 182. See *SMITH v. BANK OF SCOTLAND*, 1 Dow, 272.

<sup>3</sup> See post, §§ 68, 154.

<sup>4</sup> *Stearns, Law of Suretyship*, p. 2.

<sup>5</sup> *Bryant v. Rudisell*, 51 Tenn. (4 Heisk.) 656. See post, § 176. In a bill or note, each subsequent party to the maker and acceptor is a surety for every prior one. *CARTER v. BLACK*, 20 N. C. 561.

<sup>6</sup> *Norton, Bills & Notes* (3d Ed.) p. 80.

<sup>7</sup> *Bradford v. Hubbard*, 8 Pick. (Mass.) 155. See post, § 181.

<sup>8</sup> See post, § 22.

an express contract whose chief object is to become liable, so far as the creditor or obligee is concerned, in a manner similar to that of the principal, and is usually, though not necessarily, jointly liable with him on the same contract and to the same extent. Such would be the case where two persons sign a promissory note, and one only receives the money for which it is given. The one receiving the money would be the principal. The other signer of the note, who receives nothing, and adds his name merely to secure the repayment of the money by the principal, is a surety in the limited sense. The surety expects the principal to pay the note when due; but the holder of the note, if it be not paid at maturity, can collect the entire amount from the surety, leaving the latter to have recourse to the principal for indemnity.<sup>9</sup>

Suretyship, in its broadest sense, includes, not only contracts whose chief object is to secure the creditor, but also those whose chief object is to accomplish some other purpose, but whose effect is to make one person liable to suffer a loss if another person, whose duty it is in the first instance to pay or perform, does not do so. As an illustration of a contract of the latter kind, suppose the owner of a house worth \$2,000 mortgages it for \$1,000. Subsequently he sells it, receiving \$1,000 in cash; the grantee assuming the mortgage debt of \$1,000 as part of the purchase price. The grantee becomes, as between the grantor and grantee, primarily liable for the mortgage debt, and should pay it when due, and the grantor expects the grantee to pay the debt, and to relieve him from all further liability; but as the transaction between the grantor (mortgagor) and the grantee cannot affect the rights of the mortgagee, the latter still retains the right to enforce payment from the grantor, who thus occupies the position of a surety for the mortgage debt assumed by the grantee, though this was not the chief object of their contract, the chief object being the sale of the house.<sup>10</sup>

A surety is sometimes, in the older cases, designated as the security.<sup>11</sup> He is, in some particular contracts, given oth-

<sup>9</sup> See post, § 154.

<sup>10</sup> See post, § 20.

<sup>11</sup> In Scotch law, a surety is called a "cautioner." Black's Law Dict. 182. See *MACDOUGALL v. FOYER*, 15 Fac. Dec. 579.

er designations; thus the surety on a contract whose chief object is to secure the temporary freedom of an arrested person is designated as "bail."<sup>12</sup>

The principal and surety together are known by different designations, according to the contract entered into. They are frequently called the "promisors." In a sealed instrument, they are designated as the "obligors." Where the principal and surety have signed a promissory note, they are known as the "makers."

*The Creditor or Obligee.*

The person who can enforce the contract of suretyship is known by different designations, according to the kind of contract entered into. If the object of the contract is the payment of a sum of money, he is called the "creditor." If the contract be a sealed instrument, he is called the "obligee." If he is a party to a promissory note, he is called the "payee" or "holder."<sup>13</sup> He is frequently called the "promisee," being the person to whom the promise is made. In the case of a guaranty, he sometimes is called a "guarantee."

**DEFINITION—CO-SURETIES.**

9. Where two or more persons are bound equally upon a contract of suretyship, they are known as "co-sureties."

**SAME—CO-GUARANTORS.**

10. Two or more persons equally bound upon a contract of guaranty are known as "co-guarantors."

**SAME—SUPPLEMENTAL SURETY.**

11. A supplemental surety is one who becomes a surety for a surety.

If a promissory note be signed by A., B., and C., and A. receives the entire sum for which the note was given, B. and

<sup>12</sup> See post, c. XI.

<sup>13</sup> Norton, Bills & Notes (3d Ed.) p. 26.

C. become sureties, and, being equally liable to the creditor for the repayment of the money, are designated as co-sureties. If, however, D. should add his name with the understanding that he was not to be a co-surety with B. and C., but to be a surety for them as well as for the principal, he would become a supplemental surety<sup>14</sup> for B. and C., who would be, as to him, principals;<sup>15</sup> and, in event of his being compelled to pay the note, he could demand full indemnity from them,<sup>16</sup> whereas, if B. and C. pay the note, they have no right to call upon D. to reimburse them for any part of the amount paid,<sup>17</sup> their only recourse being upon A., their principal.<sup>18</sup> Every indorser upon a negotiable instrument occupies the position of a supplemental surety for all prior indorsers.<sup>19</sup> A person can become a supplemental surety by a separate contract, as would be the case in successive appeal bonds.<sup>20</sup>

<sup>14</sup> *Robertson v. Deatherage*, 82 Ill. 511; *Baldwin v. Fleming*, 90 Ind. 177; *McNeill v. Sanford*, 42 Ky. (3 B. Mon.) 11; *McMahan v. Geiger*, 73 Mo. 145, 39 Am. Rep. 489; *Darrah v. Osborne*, 7 N. J. Law, 71; *Wells v. Miller*, 66 N. Y. 255; *Oldham v. Broom*, 28 Ohio St. 41; *SHERMAN v. BLACK*, 49 Vt. 198. It is not necessary for a person who intends to become liable as a supplemental surety only to indicate his intention by adding any qualifying word after his signature. *Paul v. Berry*, 78 Ill. 158; *Bowser v. Rendell*, 31 Ind. 128; *Williams v. Boyce*, 11 Mo. 537. One who signs at the request of the principal and for his sole benefit is not a supplemental surety. *Monson v. Drakeley*, 40 Conn. 552, 16 Am. Rep. 74.

<sup>15</sup> *CRAYTHORNE v. SWINBURNE*, 14 Ves. 160.

<sup>16</sup> See post, c. VI, note 66.

<sup>17</sup> See post, § 162. Those jointly bound are sureties for each other. See infra, note 66. Hence a surety for two principals would occupy the position of a supplemental surety as to each for the other's share of the debt.

<sup>18</sup> See post, § 154.

<sup>19</sup> *NEWCOMB v. RAYNOR*, 21 Wend. (N. Y.) 108, 34 Am. Dec. 219.

<sup>20</sup> Where the owner of mortgaged premises conveys them, the grantee assuming the mortgage, and the grantee then conveys the premises to a third person, who also assumes the mortgage, the last grantee becomes the principal (see note 10, supra), the second grantor (first grantee) is his surety, and the first grantor (mortgagor) occupies the relation of a supplemental surety, being a surety for a surety (second grantor). *MARSH v. PIKE*, 10 Paige (N. Y.) 595. Where a person becomes a surety on a forthcoming bond, the principal in the bond being a surety on another instrument, the surety

**DISTINCTIONS BETWEEN A SURETY PROPER AND A GUARANTOR.**

12. The liability of a surety in the narrow sense begins on delivery of the contract. He undertakes usually to perform<sup>21</sup> jointly with the principal,<sup>22</sup> and is primarily liable to the creditor,<sup>23</sup> while the liability of a guarantor begins on default of the principal.<sup>24</sup> He undertakes that another will perform,<sup>25</sup> is not jointly liable with the principal,<sup>26</sup> and is secondarily liable to the creditor.<sup>27</sup>

on the bond occupies the position of a supplemental surety. *LEAKE v. FERGUSON*, 2 Grat. (Va.) 419.

<sup>21</sup> *Wilson v. Campbell*, 2 Ill. 493; *Kirby v. Studebaker*, 15 Ind. 45.

<sup>22</sup> *SAINT v. WHEELER*, 95 Ala. 362, 10 South. 539, 36 Am. St. Rep. 210; *Powell v. Kettelle*, 6 Ill. 491; *SINGER MFG. CO. v. LITTLER*, 56 Iowa, 601, 9 N. W. 905; *Read v. Cutts*, 7 Greenl. (Me.) 186, 22 Am. Dec. 184; *Simons v. Steele*, 36 N. H. 73; *Hall v. Weaver* (C. C.) 34 Fed. 104.

<sup>23</sup> *SAINT v. WHEELER*, 95 Ala. 362, 10 South. 539, 36 Am. St. Rep. 210; *CASEY v. BRABASON*, 10 Abb. Prac. (N. S., N. Y.) 368; *BALLARD v. BURTON*, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664; *KEARNES v. MONTGOMERY*, 4 W. Va. 29; *POOLEY v. HARRADINE*, 7 El. & Bl. 431; *MACDOUGALL v. FOYER*, 15 Fac. Dec. 579.

<sup>24</sup> *ABBOTT v. BROWN*, 131 Ill. 108, 22 N. E. 813; *SINGER MFG. CO. v. LITTLER*, 56 Iowa, 601, 9 N. W. 905.

<sup>25</sup> *Gridley v. Capen*, 72 Ill. 11; *American Exchange Nat. Bank v. Seaverns*, 121 Ill. App. 480; *Griffin v. Seymour*, 15 Iowa, 30, 83 Am. Dec. 396; *ROBERTS v. HAWKINS*, 70 Mich. 563, 38 N. W. 575; *RANDALL v. RIGBY*, 4 Mees. & W. 130. Sometimes it is stated, very loosely, that a guarantor undertakes to pay if the princi-

<sup>26</sup> *Killian v. Ashley*, 24 Ark. 511, 91 Am. Dec. 519; *ABBOTT v. BROWN*, 131 Ill. 108, 22 N. E. 813, affirming 30 Ill. App. 376; *McMillan v. Bull's Head Bank*, 32 Ind. 11, 2 Am. Rep. 323; *Conolly v. Kettlewell*, 1 Gill (Md.) 260; *Smith v. Loomis*, 72 Me. 51; *Parmerlee v. Williams*, 71 Mo. 410; *Barton v. Speis*, 5 Hun (N. Y.) 60; *Harris v. Eldridge*, 5 Abb. N. C. (N. Y.) 278; *Deming v. Board of Trustees*, 31 Ohio St. 41; *Tyler v. Trustees*, 14 Or. 435, 13 Pac. 329; *Meade v. McDowell*, 5 Bin. (Pa.) 195; *Cross v. Ballard*, 46 Vt. 415; *Stewart v. Glenn*, 5 Wis. 14. In some states, by statute, the principal and guarantor can be joined as defendants in one suit.

<sup>27</sup> *Anderson v. Spence*, 72 Ind. 315, 87 Am. Rep. 162; *Hooper v. Hooper*, 81 Md. 155, 81 Atl. 508, 48 Am. St. Rep. 496; *KEARNES v. MONTGOMERY*, 4 W. Va. 29.

damages only for a breach of his contract, the measure of damages, however, being determined by the amount due upon the note which the principal failed to pay; so that, practically, when the object of the contract is the payment of money, the liability of a surety and of a guarantor is almost the same, the chief distinction being in the remedy for a breach of the contract. The surety would be compelled to pay the note. The guarantor would be compelled to pay damages because the principal did not pay, the amount of damages being equal to the amount due upon the note.

**DISTINCTIONS BETWEEN A SURETY PROPER AND AN INDORSER.**

- 13. A surety proper is not entitled to have demand made upon the principal at maturity of the debt, nor to notice of the principal's default. He is liable upon the original contract. An indorser makes an independent contract, which entitles him to have demand made upon the principal at maturity, and to notice of the principal's default.**

The distinctions between a surety in the narrow sense and a regular indorser of a negotiable instrument are of considerable importance, as an indorser makes a conditional contract implied by law,<sup>24</sup> which entitles him to have demand made upon the principal at maturity of the debt and to be given notice of the default of the principal;<sup>25</sup> otherwise, he is discharged from all liability, both on the instrument and upon the original consideration. A surety, however, is liable upon his original contract along with the principal. He is not entitled to have demand made upon the principal, nor to notice.<sup>26</sup> It is his debt, and he must ascertain for himself whether it has been paid.

<sup>24</sup> Norton, Bills & Notes (3d Ed.) p. 107.

<sup>25</sup> See post, § 176.

<sup>26</sup> See post, § 98.

**DISTINCTIONS BETWEEN A GUARANTOR AND AN INDORSER.**

14. A guarantor is not entitled to have demand made upon the principal at maturity, nor to notice of default, unless he expressly stipulates therefor. His contract is that the principal will pay. An indorser is entitled to have demand made upon the principal at maturity, and to notice of the principal's default, unless he expressly waives them. His contract is not that he will pay or that another will pay, but is a conditional one that he will pay if the principal does not; and his contract is made on the same paper as the principal's is.

The chief object of the contract of a regular indorser is to transfer title.<sup>37</sup> The law implies certain conditions, as that the creditor will make demand at maturity upon the principal debtor and give the indorser notice of default; and, if these conditions are complied with, the indorser will pay.<sup>38</sup> These conditions may be waived by the indorser if he choose to do so.<sup>39</sup> The object of the contract of a guarantor is to give the creditor security.<sup>40</sup> He does not undertake to pay either unconditionally or conditionally, but his contract is that the principal will pay at maturity. He may stipulate, by express agreement, for demand and notice; but, generally, he is not entitled to them as a matter of right.<sup>41</sup> An indorsement must be made upon the instrument transferred.<sup>42</sup> A guaranty may be written upon a separate paper. The contract of the guarantor is broken as soon as the principal is in default,\* as he

<sup>37</sup> Norton, Bills & Notes (3d Ed.) p. 106.

<sup>38</sup> Bradford v. Corey, 5 Barb. (N. Y.) 462; Norton, Bills & Notes (3d Ed.) 128.

<sup>39</sup> Norton, Bills & Notes (3d Ed.) p. 401.

<sup>40</sup> First Nat. Bank of San Diego v. Babcock, 94 Cal. 102, 29 Pac. 415, 28 Am. St. Rep. 94.

<sup>41</sup> Mameron v. National Lead Co., 98 Ill. App. 460; HUNGERFORD v. O'BRIEN, 37 Minn. 306, 34 N. W. 161; Brown v. Curtiss, 2 N. Y. 230; Overton v. Tracey, 14 Serg. & R. (Pa.) 811; Hubbard v. Haley, 96 Wis. 578, 71 N. W. 1036.

<sup>42</sup> Norton, Bills & Notes (3d Ed.) p. 103.

\*Lloyd v. Matthews, 223 Ill. 477, 79 N. E. 172.



has undertaken that the principal will pay at maturity. The contract made by the indorser is not broken at default, as there are conditions yet to be performed by the creditor before the liability of the indorser is complete, and these conditions may never be performed.

It will be noticed that the distinctions between a guarantor and an indorser are of great importance. The creditor need take no action at the maturity of the debt, so far as the guarantor is concerned, as the latter has undertaken that the principal will perform his contract, and it is the duty of the guarantor to ascertain whether the principal has performed;<sup>43</sup> but, in order to hold an indorser, it is necessary for the creditor to act promptly when the debt is due, or the indorser will be freed from liability, both on the contract of indorsement and upon the original consideration.<sup>44</sup>

#### **DISTINCTIONS BETWEEN A SURETY AND AN INSURER.**

- 15. A surety undertakes to pay a sum of money, with a condition that, if certain acts are performed by another, the contract shall be void. An insurer, for a valuable consideration, agrees, subject to certain conditions, to indemnify the insured against loss consequent upon the dishonesty or default of a designated employé.<sup>45</sup>**

It is not always easy to distinguish between a contract of suretyship and a contract of fidelity or guaranty insurance.<sup>46</sup>

<sup>43</sup> See post, § 98.

<sup>44</sup> Norton, Bills & Notes (3d Ed.) p. 365.

<sup>45</sup> Vance, Ins. p. 595. "Guaranty insurance is an agreement whereby one party (called the 'insurer') for a valuable consideration (termed the 'premium') agrees to indemnify another (called the 'insured') in a stipulated amount against loss or damage arising through dishonor, fraud, unfaithful performance of duty, or breach of contract on the part of a third person (hereinafter denominated as the 'risk') sustaining a contractual relation to the party thus indemnified." Frost, Guaranty Ins. p. 11.

<sup>46</sup> Whether a contract is a guaranty or one of insurance does not depend upon the use of words. *Seaton v. Heath*, [1899] 1 Q. B. 782. Corporations calling themselves guaranty or surety companies, but who are insurers, should be treated as insurers. *Bank of Tarboro*

A person may become a surety for the faithful performance of duties by an officer by signing a bond for the payment of a sum of money, with a defeasance clause which stipulates that the bond shall be void if the officer performs his duties faithfully;<sup>47</sup> or the same person may become an insurer of an employer against loss which may be sustained by reason of the improper conduct of an employé—that is, insure the fidelity of such employé. It depends very much upon the wording of the contract, and the distinction is more formal than real. So, a person may insure against loss from bad debts, or against loss from unpaid rents. The construction of a contract of suretyship and of a contract of fidelity insurance is very much the same.

#### **DISTINCTIONS BETWEEN GUARANTY AND WARRANTY.**

- 16. A guaranty relates to persons, to the future, is a collateral contract, and must be evidenced in writing to be enforceable. A warranty relates to things, to the present or past, is a direct contract, and may be oral.**

In popular language the word “guaranty” is used in every instance for “warranty”; but, technically, the two contracts are quite different. A guaranty, in law, is an undertaking that a person will pay or do some act. It is collateral to the contract of another person, who is primarily bound. As we shall see later, such a contract, to be enforceable, must be evidenced by writing.<sup>48</sup> A warranty relates to things, not persons, and to the present and past. There is no one collaterally bound; and an oral warranty is enforceable. For illustration, we guaranty that A. will pay a debt; but we warrant that a horse is sound. A warranty may appear to relate to the future, as, for illustration, a warranty of the durability of a machine; but the undertaking here is rather that the machine has been so well manufactured and of such material that it should last a given time. So a guaranty may be worded in the pres-

v. Fidelity & Deposit Co., 128 N. C. 866, 38 S. E. 908, 83 Am. St. Rep. 682.

<sup>47</sup> See form of official bond in Appendix; and, post, c. IX.

<sup>48</sup> See post, c. III.

ent tense, but really referring to the future, as a guaranty that a note is collectible means that the maker will be solvent when the note is due.<sup>49</sup>

#### CLASSIFICATION OF SURETYSHIP.

17. The relation of suretyship can arise from contract only; but the chief object, nature, and form of the contract may not be always the same.
18. Suretyship may be classified:
  - (a) As to the form of the contract into—
    - (1) Voluntary.
    - (2) Involuntary, or by operation of law.
  - (b) As to the nature of the liability into—
    - (1) Personal.
    - (2) Real.<sup>50</sup>
19. Voluntary suretyship arises where the chief object of the contract is to become a surety.
20. Involuntary suretyship arises where the chief object of the contract is to accomplish some other purpose than security, but its effect is to make one of the parties secondarily liable for a debt or for the performance of an act by another.
21. Personal suretyship arises where the surety may be made to respond in damages generally for a breach of his contract.
22. Real suretyship arises where certain specific property can be taken to enforce payment of another's debt, or the performance of some duty owing by another, and the owner of such property, if he would save it, must pay or perform, but he is not personally liable in damages.

The relation of suretyship is never implied, but must be the result of an express contract. If the very object for which the contract is entered into is to become a surety, it is designated as voluntary suretyship. The most common of such contracts is becoming a party to a negotiable instrument for the purpose of giving the holder additional security,<sup>51</sup> signing a bond to secure the faithful performance of services by

<sup>49</sup> See post, § 123.

<sup>50</sup> See Stearns, Law of Suretyship, p. 3.

<sup>51</sup> Ward v. Stout, 32 Ill. 899; VAIL v. FOSTER, 4 N. Y. 312.

an officer, or to secure the performance of some act, and all contracts of suretyship in the narrow sense.<sup>52</sup> However, it frequently happens that contracts are made whose chief object is to accomplish some purpose other than to become liable for the debt, default, or miscarriage of another, but which, incidentally, have that effect. These are contracts of suretyship in the broad sense.<sup>53</sup> Whenever one person is liable to suffer a loss through failure of another to pay a debt or to perform a duty, which the latter should pay or perform, the law extends to the person so liable the rights and privileges of a surety. If the surety is subject to an action, and to have judgment rendered against him personally for damages, which can be enforced by a levy and sale of his property generally, the suretyship is designated as personal; but if the debt of another is only a lien upon his property, with no personal liability upon him, and, upon the default of the debtor, he must discharge the debt to prevent the lien from being enforced upon his property, the suretyship is designated as real. A few of the most common instances of suretyship arising by operation of law will be noticed here.

*Sale of Property Subject to Liens.*

Where property subject to liens is sold, either the seller or buyer, by operation of law, may become a surety in the broad sense; the primary liability falling upon the one who, under their contract, has assumed, as between themselves, the payment of the debt secured by the lien. A common transaction is the sale of real property upon which a mortgage exists; the grantee assuming the mortgage debt as a part of the purchase price. As between the grantor and the grantee, the latter is expected to pay the mortgage at maturity and relieve the grantor from all liability. Still the transaction between the grantor and the grantee cannot affect the rights of the mortgagee to call upon the original mortgagor for the payment of

<sup>52</sup> In Scotch law, the instrument in which a person binds himself as surety is called a "cautionary." Black's Law Dict. 182.

<sup>53</sup> It is a common stipulation in fire insurance policies that, after a loss resulting from the tort of another, the insurer is entitled to subrogation to the insured's right of action for damages against the wrong-doer. In such cases the insurer occupies the relation of surety. CHICAGO & A. R. CO. v. GLENNY, 175 Ill. 238, 51 N. E. 896.

the debt, and if the grantee does not carry out his agreement with the grantor, and pay the mortgage at maturity, the mortgagee has the right to proceed against the mortgagor.<sup>54</sup> The grantor, by his contract, having assumed a secondary liability for the mortgage debt, the law extends to him the rights of a surety,<sup>55</sup> such as releasing him from all liability if the mortgagee, by agreement with the grantee alone, should extend the time of payment.<sup>56</sup>

On the other hand, the grantee of real estate may become a surety by operation of law. Such would be the case where the grantee pays full value for the property, and receives a warranty deed, but the property is subject to the lien of a judgment against the grantor.<sup>57</sup> The grantor may undertake, expressly, to remove this lien; but, whether he does or not, by his warranty deed and the receipt of the full value he has undertaken to give the grantee a clear title, and is liable for a breach of his warranty if he do not remove the lien. If the grantee be compelled to pay the judgment in order to save the property, he could recover from the grantor. This would be a case of real as well as of involuntary suretyship. By becoming secondarily liable for this judgment, the grantee,

<sup>54</sup> Under the old common-law rule, unless the mortgagee has assented to the arrangement between the grantor and the grantee, the grantor (mortgagor) was the only person whom the mortgagee could have held personally liable, as there was no privity of contract between the grantee and the mortgagee; but in some states this rule has been modified so as to permit a person for whose benefit a contract is made to sue upon it, and the rule has in some states been changed by statute.

<sup>55</sup> *Flagg v. Geltmacher*, 98 Ill. 293; *Ellis v. Johnson*, 96 Ind. 383; *Union Stove & Machine Works v. Caswell*, 48 Kan. 689, 29 Pac. 1072, 16 L. R. A. 85; *Rice v. Sanders*, 152 Mass. 108, 24 N. E. 1079, 8 L. R. A. 315, 23 Am. St. Rep. 804; *American Nat. Bank v. Klock*, 58 Mo. App. 335; *Huyler's Ex'rs v. Atwood*, 26 N. J. Eq. 504; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130, affirming 8 Hun (N. Y.) 222; *MURRAY v. MARSHALL*, 94 N. Y. 611; *Cook v. Berry*, 193 Pa. 377, 44 Atl. 771; *Bishop v. Day*, 13 Vt. 81, 37 Am. Dec. 582; *Curry v. Hale*, 15 W. Va. 867; *Palmeter v. Carey*, 63 Wis. 426, 21 N. W. 703, 23 N. W. 586; *Union Mut. Life Ins. Co. v. Hanford (C. C.)* 27 Fed. 583; 40 Cent. Dig. col. 1670.

<sup>56</sup> See post, § 108.

<sup>57</sup> *Barnes v. Mott*, 64 N. Y. 397, 21 Am. Rep. 625, affirming 6 Daly (N. Y.) 150; *Lowry v. McKinney*, 68 Pa. 294.

through his property, is given the rights of a surety, and subsequent dealing by the lien holder with the grantor is liable to result in a discharge of the property from the lien.

Where a sale is made, the grantee assuming one debt which is a lien upon the property, and the grantor remaining liable for another debt which is a lien, each would occupy the position of a surety as to the respective debts.<sup>58</sup>

#### *Partnership Changes.*

Another quite common instance of suretyship by operation of law arises when changes are made in partnerships, where there are firm debts which are assumed by certain partners.<sup>59</sup> Suppose A., B., and C. are partners. A. withdraws from the firm, and B. and C. assume payment of all of the firm debts; the intention being, among themselves, to relieve A. from all liability. Their agreement cannot affect the right of the firm creditors to enforce payment of all of the firm debts from A., should B. and C. from any cause fail to pay them, as every partner is personally liable for all of the debts of the partnership,<sup>60</sup> and cannot free himself from this liability without the creditor's consent. It will be seen that A., by remaining liable for the debts, the payment of which the others have assumed, occupies the position of a surety for those debts. The same principle applies, whether new partners come in, or old partners leave the firm,<sup>61</sup> or both,<sup>62</sup> or upon a dissolution of

<sup>58</sup> *Snyder v. Robinson*, 85 Ind. 311, 9 Am. Rep. 738.

<sup>59</sup> *Wendlandt v. Sohre*, 37 Minn. 162, 33 N. W. 700; *Sizer v. Ray*, 87 N. Y. 220. Where a stockholder in a corporation can be held liable by the corporate creditors for the difference between the face value of his stock and the amount actually paid by him, he occupies the position of a surety for the corporation; and if one stockholder pay more than his proportionate share of the corporate debts, he is entitled to contribution from the others occupying the same relation. *Wolters v. Henningsan*, 114 Cal. 433, 46 Pac. 277; *Buchanan v. Meisser*, 105 Ill. 638.

<sup>60</sup> *George*, Partnership, p. 249.

<sup>61</sup> *Moore v. Topliff*, 107 Ill. 241; *Williams v. Boyd*, 75 Ind. 286; *SMITH v. SHELDEN*, 35 Mich. 42, 24 Am. Rep. 529; *Thurber v. Corbin*, 51 Barb. 215; *Shamburg v. Abbott*, 112 Pa. 6, 4 Atl. 518; *Johnson v. Young*, 20 W. Va. 614.

<sup>62</sup> *Morss v. Gleason*, 64 N. Y. 207.

the partnership,\*\* if some arrangement be made among them whereby a portion only of the partners assume the payment of the debts owing by the firm at the time of the change.

*Mortgages and Pledges to Secure Another's Debt.*

It not infrequently happens that a person will pledge or mortgage his property to secure the debt of his friend, the pledgor<sup>64</sup> or mortgagor<sup>65</sup> not becoming personally liable for the debt, but being obliged to pay the debt, if the borrower do

<sup>63</sup> West v. Chasten, 12 Fla. 315; Chandler v. Higgins, 100 Ill. 602; Bays v. Conner, 105 Ind. 415, 5 N. E. 18; Leithauser v. Baumeister, 47 Minn. 151, 49 N. W. 660, 28 Am. St. Rep. 336; Burnside v. Fetzner, 63 Mo. 107; Barber v. Gillson, 18 Nev. 89, 1 Pac. 452; Waddington v. Vredenberg, 2 Johns. Cas. (N. Y.) 227; Bryan v. Henderson, 88 Tenn. (4 Pickle) 23, 12 S. W. 338. The purchaser of a firm's business, assuming the firm's debts, is a principal, and the former partners are the sureties therefor. Malanaphy v. Fuller, 125 Iowa, 719, 101 N. W. 640, 106 Am. St. Rep. 332; Berbling v. Glaser, 23 N. Y. Supp. 118, 3 Misc. Rep. 624; Brill v. Hoile, 53 Wis. 537, 11 N. W. 42.

<sup>64</sup> Mitchell v. Roberts (C. C.) 5 McCrary, 425, 17 Fed. 776; Price v. Dime Bank, 124 Ill. 317, 15 N. E. 754, 7 Am. St. Rep. 387. See, also, National Bank of Commerce v. Schirm (Cal. App.) 86 Pac. 981. The rule is the same, though the pledgor be the wife of the principal. Allis v. Ware, 28 Minn. 166, 9 N. W. 606. Nor does it make any difference that the property is pledged without the knowledge or authority of the owner, if the pledgee is entitled to hold it as against the owner, as would be the case with negotiable instruments intrusted to an agent who fraudulently pledged them for his own debt; the pledgee being ignorant of the lack of authority of the agent. McBRIDE v. POTTER-LOVELL CO., 169 Mass. 7, 47 N. E. 242, 61 Am. St. Rep. 265; Gould v. Central Trust Co., 6 Abb. N. C. (N. Y.) 381.

<sup>65</sup> White v. Ault, 19 Ga. 551; Christner v. Brown, 16 Iowa, 130; METZ v. TODD, 36 Mich. 473; Averill v. Loucks, 6 Barb. (N. Y.) 470; Hinton v. Greenleaf, 113 N. C. 6, 18 S. E. 56; Leffingwell v. Freyer, 21 Wis. 392; 40 Cent. Dig. col. 1672. See, also, Moses v. Home Ass'n, 100 Ala. 465, 14 South. 412. A wife, who mortgages her property for her husband's debt, is a surety. Spear v. Ward, 20 Cal. 659; Bank of Albion v. Burns, 46 N. Y. 170; Gahn v. Niemcewicz's Ex'rs, 11 Wend. (N. Y.) 312; Well v. Thomas, 114 N. C. 197, 19 S. E. 103. But where the transferee of property fraudulently transferred executes a mortgage on such property by order of court to secure the indebtedness of the transferor, he is not a surety, but the principal. Willson v. Hinman, 99 App. Div. 41, 90 N. Y. Supp. 746.

not, in order to prevent the property being sold to satisfy the lien. Being thus liable to suffer a loss through his property for the debt of another, he is entitled to the rights of a surety, this being another instance of real suretyship.

#### *Joint Debts.*

If two or more persons borrow money, and each receives a portion thereof, each becomes a principal as to the portion received by him and a surety for the share received by the others.<sup>66</sup> For illustration, suppose A., B., and C. borrow \$3,000, and give a promissory note signed by all of them for that amount, each receiving \$1,000. A. would be a principal to the extent of the \$1,000 he had received; but, as he may be compelled to pay the entire amount of the note, he occupies the position of a surety as to the other \$2,000 received by B. and C.<sup>67</sup>

If a tract of land, subject to a mortgage, be sold, one-half to A. and one-half to B., although each half would be subject equitably to its proportion of the mortgage, the mortgagee could subject either half to the entire mortgage; hence A. and B. each would occupy the position of a surety as to that half of the mortgage which equitably should be enforced against the half of the land not owned by him.<sup>68</sup>

<sup>66</sup> *Owen v. McGehee*, 61 Ala. 440; *Chipman v. Morrill*, 20 Cal. 130; *Hall v. Hall*, 34 Ind. 314; *Dalgle's Succession*, 15 La. Ann. 594; *Hatch v. Norris*, 86 Me. 419; *Fletcher v. Grover*, 11 N. H. 368, 35 Am. Dec. 497; *Crafts v. Mott*, 4 N. Y. (4 Comst.) 604; *Sterling v. Stewart*, 74 Pa. (24 P. F. Smith) 445, 15 Am. Rep. 559; *Deitzler v. Mishler*, 37 Pa. 82; *Traders' Nat. Bank v. Clare*, 76 Tex. 47, 13 S. W. 183. The same rule applies where the debt is not joint, but each liable for the entire amount, as would be the case of two or more insurers of property for its full value, without any stipulation in the policies in regard to other insurance. *Vance, Ins.* p. 54.

Two principals in a joint bond would be sureties for each other. *Moore v. State*, 49 Ind. 558; *Collins v. Carlisle*, 7 B. Mon. (Ky.) 13; *Newton v. Newton*, 53 N. H. 537; *Stokes v. Hodges*, 11 Rich. Eq. (S. C.) 135; *Boyd's Ex'rs v. Boyd's Heirs*, 3 Grat. (Va.) 113.

<sup>67</sup> *Goodall v. Wentworth*, 20 Me. (7 Shep.) 322; *Henderson v. McDuffee*, 5 N. H. 38, 20 Am. Dec. 557; 40 Cent. Dig. col. 1668.

<sup>68</sup> *Williams v. Perry*, 20 Ind. 437, 83 Am. Dec. 327; *Cornell v. Prescott*, 2 Barb. (N. Y.) 16; *Van Renselaer v. Akin*, 22 Wend. (N. Y.) 549.



**CLASSIFICATION OF GUARANTIES.**

- 23. Guaranties are classified as follows:**
- (a) Continuing or Open, and Noncontinuing or Limited.**
  - (b) Absolute, Conditional, and Contingent.**
  - (c) General and Special.**
  - (d) Revocable and Irrevocable.<sup>66</sup>**
  - (e) Commercial and Noncommercial.**
- 24. A continuing or open guaranty is one which covers a course of dealing for an indefinite time, or contemplates a succession of credits.**
- 25. A limited or, noncontinuing guaranty covers a single transaction, and is temporary.**
- 26. An absolute guaranty is an unqualified promise that the principal will pay or perform.**
- 27. A conditional guaranty is one which requires the performance of some condition by the creditor before the guarantor will become liable.**
- 28. A contingent guaranty is one in which the guarantor will not be liable, except upon the happening or not happening of some event.**
- 29. A general guaranty is one addressed to the public, entitling any person to act upon it.**
- 30. A special guaranty is one addressed to a particular person or persons.**
- 31. A revocable guaranty is one which can be terminated by the guarantor without the consent of the other party.**
- 32. An irrevocable guaranty is one which cannot be terminated by the guarantor without the consent of the other party.**
- 33. A commercial guaranty is one which relates to trade.**
- 34. A noncommercial guaranty is one which does not pertain to trade.**

As will be seen from the above, guaranties are capable of numerous classifications, and the rights and liabilities of the parties to them differ accordingly.

Guaranties may extend to past or to future dealings, or to both. If the object of the guaranty is to enable the principal to have credit over an extended time, and to cover suc-

<sup>66</sup> NATIONAL EAGLE BANK v. HUNT, 16 R. I. 148, 13 Atl. 115.

cessive transactions, it is a continuing one;<sup>70</sup> but if the intention of the guarantor, as indicated by the language used, is that but one transaction is to be covered by the guaranty, it is a limited one.<sup>71</sup>

*Absolute, Conditional, and Contingent Guaranties.*

Most guaranties are absolute; and, upon default of the principal, the guarantor becomes liable without any action upon the part of the creditor.<sup>72</sup> The most common forms of absolute guaranty are those indorsed upon negotiable instruments. If the liability of the guarantor depends upon any other event than the default of the principal, the guaranty is conditional. Thus, a guarantor might annex a condition that a demand be made upon the principal when the debt is due, and that notice of the principal's default be given, and he would not be liable unless there was a compliance with these conditions;<sup>73</sup> or he might guaranty payment upon the contingency of the principal being insolvent at the maturity of the debt, and he would not be liable unless the contingency happened. Usually, no distinction is made between conditional and contingent guaranties, each being designated as conditional.

*Guaranties of Payment and of Collection.*

The courts make a distinction between a guaranty of payment and a guaranty of collection, designating the former as an absolute guaranty and the latter as a conditional guaranty.<sup>74</sup> A guaranty of payment is an unconditional undertaking on the part of the guarantor that the principal debtor will pay at maturity.<sup>75</sup> A guaranty of collectibility is an undertaking by the guarantor that the debt can be collected

<sup>70</sup> *Twohy v. McMurran*, 57 Minn. 242, 59 N. W. 301.

<sup>71</sup> See post, c. IV, note 66, as to the construction of guaranties.

<sup>72</sup> See post, § 98.

<sup>73</sup> See post, § 125.

<sup>74</sup> Some of the earlier cases make no distinction between absolute and conditional guaranties, making them all conditional to the extent of requiring recourse to the principal before resorting to the guarantor. *Craig v. Phipps*, 23 Miss. 240; *Farrow v. Respass*, 33 N. C. 170; *Johnston v. Chapman*, 3 Pen. & W. (Pa.) 18; *Benton v. Gibson*, 1 Hill (S. C.) 56.

<sup>75</sup> *Brown v. Courtiss*, 2 N. Y. 225.

at maturity by the ordinary process of law. A guaranty of collectibility is called a conditional one,<sup>76</sup> because, generally, in order to show that the debt is not collectible, the creditor is required to use diligence in endeavoring to collect it by a suit at law, and, in order to hold the guarantor, he must show that he has complied with the condition of having brought suit and trying to satisfy his judgment out of the principal.<sup>77</sup>

*General and Special Guaranties.*

A general guaranty most frequently arises in the case of a letter of credit. A letter of credit is a written request that money or credit be given to a person named therein, coupled with an engagement that the writer will be answerable, if his request be complied with, for the default of such person, or that the writer will accept bills drawn upon him on account of such person.<sup>78</sup> If the letter be addressed so as to authorize any one to act upon it, it is a general letter of credit.<sup>79</sup> Such would be the case if the letter were addressed "To Whom It may Concern," or to the principal himself; but if the guaranty, as is most generally the case, be addressed to some particular person or persons, it is a special guaranty, and only those addressed can hold the guarantor by acting upon it.<sup>80</sup>

<sup>76</sup> *Allen v. Rundle*, 50 Conn. 9, 47 Am. Rep. 599; *Dillman v. Nadelhoffer*, 100 Ill. 121, 43 N. E. 378, affirming 56 Ill. App. 396; *Peck v. Frink*, 10 Iowa, 193, 74 Am. Dec. 384; *Clark v. Kellogg*, 96 Mich. 171, 55 N. W. 667; *BRACKETT v. RICH*, 23 Minn. 485, 23 Am. Rep. 703; *Mead v. Parker*, 111 N. Y. 259, 18 N. E. 727; *Roberts, Throp & Co. v. Laughlin*, 4 N. D. 167, 59 N. W. 967; *Stone v. Rockefeller*, 29 Ohio St. 625; *Evans v. Bell*, 45 Tex. 553; *Sylvester v. Downer*, 18 Vt. 32; *Getty v. Schantz*, 101 Wis. 229, 77 N. W. 191.

<sup>77</sup> Recourse to the principal may be excused, if he be hopelessly insolvent and that fact be shown. See post, § 126, where this subject is more fully treated.

<sup>78</sup> A letter of credit must not be confused with circular letters of credit issued by banks to travelers.

<sup>79</sup> *EVANSVILLE NAT. BANK v. KAUFMANN*, 93 N. Y. 273, 45 Am. Rep. 204; *UNION BANK OF LOUISIANA v. COSTER'S EX'RS*, 8 N. Y. 203, 53 Am. Dec. 280; *Wheeler v. Mayfield*, 31 Tex. 395, 98 Am. Dec. 545.

<sup>80</sup> *Johnson v. Brown*, 51 Ga. 498; *Second Nat. Bank of Peoria v. Defendorf*, 90 Ill. 396; *Mitchell v. Railton*, 45 Mo. App. 273; *EVANSVILLE NAT. BANK v. KAUFMANN*, 93 N. Y. 273, 45 Am. Rep. 204;

*Revocable and Irrevocable Guaranties.*

If it be within the power of the guarantor to terminate his contract at any time, it is designated as revocable, and he cannot be held for any transaction which occurs after receipt of the notice of revocation,<sup>\*1</sup> though he still remains liable for any dealings which have occurred between the creditor and the principal up to the time of giving notice. If the guarantor has so bound himself that he cannot terminate his contract at pleasure, the guaranty is an irrevocable one.<sup>\*2</sup>

*Commercial and Noncommercial Guaranties.*

Guaranties given in the course of trade are called "commercial guaranties,"<sup>\*3</sup> such as a guaranty of the price of goods purchased by a merchant. Other guaranties are non-commercial.

UNION BANK OF LOUISIANA v. COSTER'S EX'RS, 3 N. Y. 203, 53 Am. Dec. 280. See post, § 135.

<sup>\*1</sup> See post, § 112, as to the rights and liabilities of the parties with respect to revocation.

<sup>\*2</sup> Where the engagements of a candidate to an association were guarantied, it is not revocable; for, if revocable, the guarantor could have revoked it the moment the principal was admitted to the association, and the guaranty would have been utterly futile and idle. In an irrevocable guaranty, the consideration is given once for all; in this case, the admission of the principal to membership. LLOYD'S v. HARPER, 16 Ch. Div. 290.

<sup>\*3</sup> Most guaranties are commercial, being connected with some mercantile or business transaction. See Stearns, Law of Suretyship, p. 55.

## CHAPTER II.

## FORMATION OF THE CONTRACT.

- 35. Essentials of the Contract.
- 36-40. Offer and Acceptance.
- 41. Delivery of Contract.
- 42-44. Signing on Condition.
- 45. Failure of Principal to Execute Contract.
- 46-47. Formality of Contract.
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- 49-51. Consideration.
- 52-53. Competency of Parties.
- 54. Fraud.
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- 57-60. Statutory and Voluntary Bonds.
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- 63-66. Agency.
- 67. Conflict of Laws.
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## ESSENTIALS OF THE CONTRACT.

35. To create a contract of suretyship there must be:
- (a) An offer and acceptance.
  - (b) The formality required by law.
  - (c) A consideration.
  - (d) Competent parties.

As a contract of suretyship is formed, in many respects, as any other contract, it is not the intention to set forth here the rules which govern the formation of contracts in general, but those only which are peculiar to this subject. For more extended information in regard to the contract in general, reference should be made to some work on Contracts.<sup>1</sup>

<sup>1</sup> See Clark, Contracts (2d Ed.).

## ACCEPTANCE OF OFFER.

36. An offer to become a surety or a guarantor must be accepted before a binding contract is effected; and formal notice of such acceptance must be given to the offerer, unless—

- (a) The offer relates to an existing or concurrent indebtedness.
- (b) The offer is absolute and definite in its terms.
- (c) The offer comes from the creditor.
- (d) The offerer receives a consideration.
- (e) The contract is bilateral.
- (f) The offerer is not injured by lack of notice.
- (g) Notice is waived.

37. In some jurisdictions, acceptance is indicated sufficiently by acting on the offer, without formal notice.

*Necessity of Acceptance.*

The general rule of contracts is that an offer must be accepted by the offeree before a binding contract can be effected, and such acceptance may be by word or act.<sup>2</sup> The rule as to acceptance is the same in contracts of suretyship, but there is a lack of harmony in the decisions as to what constitutes acceptance of an offer to guaranty.

*Formal Notice Not Required in Some States.*

The old common-law rule was that formal notice was unnecessary,<sup>3</sup> that acting on the offer was sufficient acceptance, and that the guarantor should make inquiry or stipulate for notice if he desired it. This is the rule in New York,<sup>4</sup> Ohio,<sup>5</sup> and some other states.<sup>6</sup>

<sup>2</sup> Clark, Contracts (2d Ed.) p. 13. Where the original proposition from the person intending to become a guarantor is an offer pure and simple, there must be an acceptance, even in those states which do not require a formal notice of acceptance of a guaranty. *Beekman v. Hale*, 17 Johns. (N. Y.) 134; *Fellows v. Prentiss*, 3 Denio (N. Y.) 512, 45 Am. Dec. 484; *William Deering & Co. v. Mortell* (S. D. 1906) 110 N. W. 86.

<sup>3</sup> *SOMERSALL v. BARNEBY*, Cro. Jac. 287.

<sup>4</sup> *City Nat. Bank of Poughkeepsie v. Phelps*, 86 N. Y. 484; *Niles Tool Works Co. v. Reynolds*, 4 App. Div. 24, 38 N. Y. Supp. 1028;

<sup>5</sup> See note 5 on following page.

<sup>6</sup> See note 6 on following page.

*Formal Notice Required in Most States.*

In most jurisdictions,<sup>7</sup> including Massachusetts,<sup>8</sup> Pennsylvania,<sup>9</sup> Michigan,<sup>10</sup> Illinois,<sup>11</sup> Missouri,<sup>12</sup> Minnesota,<sup>13</sup> Indiana,<sup>14</sup> and Iowa,<sup>15</sup> formal notice of acceptance to the offeror is required, or he is not bound; and this is the rule adopted

UNION BANK OF LOUISIANA v. COSTER'S EX'RS, 3 N. Y. 203, 53 Am. Dec. 280.

<sup>8</sup> Wise v. Miller, 45 Ohio St. 388, 14 N. E. 218; Powers v. Bumcratz, 12 Ohio St. 273.

<sup>9</sup> Fisk v. Stone, 6 Dak. 85, 50 N. W. 125; Platter v. Green, 26 Kan. 252; Boyd v. Snyder, 49 Md. 325; Lininger & Metcalf Co. v. Wheat, 49 Neb. 567, 68 N. W. 941; Yancey v. Brown, 3 Sneed (Tenn.) 89; Wells, Fargo & Co. v. Davis, 2 Utah, 411; McNaughton v. Conkling, 9 Wisa. 316.

<sup>7</sup> SAINT v. WHEELER, 95 Ala. 362, 10 South. 539, 36 Am. St. Rep. 210; Lane v. Levillian, 4 Ark. (4 Pike) 76, 37 Am. Dec. 769; Geiger v. Clark, 13 Cal. 579; Rapelye v. Bailey, 3 Conn. 438, 8 Am. Dec. 199; Farmers' Bank v. Tatnall, 7 Houst. (Del.) 287, 31 Atl. 879; Claffin v. Briant, 58 Ga. 414; GANO v. FARMERS' BANK OF KENTUCKY, 103 Ky. 508, 45 S. W. 519, 82 Am. St. Rep. 596; Bank of Illinois v. Sloo, 16 La. 539, 35 Am. Dec. 223; Bradley v. Cary, 8 Me. 234; Montgomery v. Kellogg, 43 Miss. 486, 5 Am. Rep. 508; Shewell v. Knox, 12 N. C. 404; King v. Batterson, 13 R. I. 117, 43 Am. Rep. 13; Duncan v. Heller, 13 S. C. 94; Mayfield v. Wheeler, 37 Tex. 256; Noyes v. Nichols, 28 Vt. 159. In some states formal notice is required by statute. Willam Deering & Co. v. Mortell (S. D.) 110 N. W. 86.

<sup>8</sup> Bishop v. Eaton, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437; Mussey v. Rayner, 39 Mass. (22 Pick.) 223.

<sup>9</sup> Acme Mfg. Co. v. Reed, 197 Pa. 359, 47 Atl. 205, 80 Am. St. Rep. 832; Evans v. McCormick, 167 Pa. 247, 31 Atl. 503; Coe v. Buehler, 110 Pa. 366, 5 Atl. 20; Kay v. Allen, 9 Pa. (9 Barr) 320.

<sup>10</sup> De Cremer v. Anderson, 113 Mich. 578, 71 N. W. 1090.

<sup>11</sup> Sears v. Swift, 66 Ill. App. 496; Newman v. Streater Coal Co., 19 Ill. App. 594; Cooke v. Orne, 37 Ill. 186.

<sup>12</sup> Pearsell Mfg. Co. v. Jeffreys, 183 Mo. 386, 81 S. W. 901, 105 Am. St. Rep. 496; Taylor v. Shouse, 73 Mo. 361; Central Sav. Bank v. Shine, 48 Mo. 456, 8 Am. Rep. 112.

<sup>13</sup> Winnebago Paper Mills v. Travis, 56 Minn. 480, 58 N. W. 36; Straight v. Wight, 60 Minn. 515, 63 N. W. 105.

<sup>14</sup> Furst & Bradley Mfg. Co. v. Black, 111 Ind. 308, 12 N. E. 504; Snyder v. Click, 112 Ind. 293, 13 N. E. 581; Milroy v. Quinn, 69 Ind. 406, 35 Am. Rep. 227; Stewart v. Knight & Jilson Co. (Ind. App.) 71 N. E. 182.

<sup>15</sup> German Sav. Bank v. Drake Roofing Co., 112 Iowa, 184, 84 N. W. 960, 51 L. R. A. 758, 84 Am. St. Rep. 835.

in the United States courts.<sup>16</sup> The rule that acceptance may be effected by acting on the offer is held not to apply to an offer of this character, because the offerer does not know that the offer has been acted upon, the dealings being between the creditor and the principal, and there has been no meeting of the minds. The proposal has not become effective and binding as an obligation until formally accepted.<sup>17</sup> In some jurisdictions, the reason for requiring formal notice seems to arise from the peculiar nature of the contract of guaranty. The offerer is entitled to know whether his offer has been accepted, in order that he may arrange his relations with the person for whose benefit the guaranty is to be given.<sup>18</sup> If the initial step is taken by the person offering to become a guarantor, it does not follow, as a matter of course, that the person to whom the offer is made is willing to have business dealings with the person who desires credit, or that such person, though willing to deal with the principal, regards the guaranty as sufficient security. Suppose a country merchant, going to a city to buy goods, carries with him an offer from his local bank to guaranty payment of such goods as the merchant shall buy from a wholesale house to which the guaranty is addressed. The bank does not know, in the first place, whether the merchant will have any business dealing with the wholesale house; or, if he does, whether they may not be willing to rely solely upon the credit of the retail merchant; or, in event of their willingness to have business dealings with him, whether they regard the security of the bank sufficient.

<sup>16</sup> DAVIS SEWING MACHINE CO. v. RICHARDS, 115 U. S. 524, 6 Sup. Ct. 173, 29 L. Ed. 480; Lee v. Dick, 35 U. S. (10 Pet.) 482, 9 L. Ed. 503; Douglass v. Reynolds, 7 Pet. (U. S.) 113, 8 L. Ed. 626.

<sup>17</sup> Ruffner v. Love, 33 Ill. App. 601; Lachman v. Block, 47 La. Ann. 505, 17 South. 153, 28 L. R. A. 255; Howe v. Nickels, 22 Me. (9 Shep.) 175; Winnebago Paper Mills v. Travis, 56 Minn. 490, 53 N. W. 36; Mitchell v. Rallton, 45 Mo. App. 273; Kellogg v. Stockton, 29 Pa. 460; Wilkins v. Carter, 84 Tex. 438, 19 S. W. 997; DAVIS SEWING MACHINE CO. v. RICHARDS, 115 U. S. 524, 6 Sup. Ct. 173, 29 L. Ed. 480; DAVIS v. WELLS, 104 U. S. 159, 26 L. Ed. 686; Louisville Mfg. Co. v. Welch, 10 How. (U. S.) 461, 18 L. Ed. 497; 25 Cent. Dig. col. 28.

<sup>18</sup> McCollum v. Cushing, 22 Ark. 540; Bishop v. Eaton, 161 Mass. 499, 37 N. E. 665, 42 Am. St. Rep. 437; Oaks v. Weller, 13 Vt. 106, 37 Am. Dec. 583.



It is considered not to be just, some years after, for the wholesale house to notify the bank that they had sold goods to the merchant, relying upon the strength of the guaranty, and that they looked to the bank for payment. If the bank had been notified of the acceptance of their offer when it was made, they could have taken steps to protect themselves against the principal. But, even in the jurisdictions which require formal notice of acceptance, certain exceptions have been made, the effect of which is to limit the necessity of notice to offers to guaranty future indebtedness, where the terms are uncertain, and the offerer does not know whether or not his offer will be accepted.

*Pre-existing or Concurrent Indebtedness.*

Where a guaranty is given for a contract already made and within the knowledge of the guarantor,<sup>19</sup> or is given at the same time as the contract which is guaranteed,<sup>20</sup> no subsequent formal notice to the guarantor is necessary, as the guarantor knows that his offer will be accepted.

*Absolute and Definite Undertaking.*

Where the offer is in the form of an absolute undertaking,<sup>21</sup> definitely fixing the terms,<sup>22</sup> formal acceptance is unneces-

<sup>19</sup> *Nading v. McGregor*, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686; *Davis Sewing Mach. Co. v. Jones*, 61 Mo. 409; *Klosterman v. Olcott*, 25 Neb. 382, 41 N. W. 250; *Wise v. Miller*, 45 Ohio St. 388, 14 N. E. 218; *Shupe v. Galbraith*, 32 Pa. 19; *Wells, Fargo & Co. v. Davis*, 2 Utah, 411.

<sup>20</sup> *Village of Chester v. Leonard*, 68 Conn. 495, 37 Atl. 397; *Solary v. Stultz*, 22 Fla. 263; *Sanders v. Etcherson*, 36 Ga. 404; *Wright v. Griffith*, 121 Ind. 478, 23 N. E. 281, 6 L. R. A. 639; *Mitchell v. McCleary*, 42 Md. 374; *Wildes v. Savage*, 1 Story, 22, Fed. Cas. No. 17,653. *Contra, Duncan v. Heller*, 13 S. C. 94; *Wilkins v. Carter*, 84 Tex. 438, 19 S. W. 997.

<sup>21</sup> *Walker v. Forbes*, 25 Ala. 139, 60 Am. Dec. 498; *New Haven County Bank v. Mitchell*, 15 Conn. 206; *Solary v. Stultz*, 22 Fla. 263; *Frost v. Standard Metal Co.*, 215 Ill. 240, 74 N. E. 139, affirming 116 Ill. App. 642; *American Exch. Nat. Bank v. Seaverns*, 121 Ill. App. 480; *Kilne v. Raymond*, 70 Ind. 271; *Carman v. Elledge*, 40 Iowa, 409; *Long v. Hemphill*, 5 Ky. Law Rep. 771; *Paige v. Parker*, 74 Mass. (8 Gray) 211; *Crittenden v. Fiske*, 46 Mich. 70, 8 N. W. 714, 41 Am. Rep. 146; *Farmers' & Mechanics' Bank v. Kercheval*, 2 Mich.

<sup>22</sup> *Roberts v. Hawkins*, 70 Mich. 506, 38 N. W. 575.

sary. Thus, where a letter read, "If you will let A. have \$100 worth of goods on a credit of three months, you may regard me as guarantying the same," formal notice of acceptance was unnecessary, as the undertaking was absolute.<sup>23</sup>

*Offer from the Creditor.*

It sometimes happens that the offer comes from the creditor, in which case the giving of the guaranty is an acceptance of the offer, and the guaranty is complete as soon as the guaranty is given.<sup>24</sup> Such would be the case where a person applies for a loan of money, and is told that the loan will be given him if a certain person named will become surety. The borrower communicates this fact to the person designated, who thereupon signs the note with the principal, which note is delivered to the creditor, and no further action is taken until the note is due and unpaid. The surety cannot defend successfully on the ground that he had received no notice of his offer to become a surety. His act was an acceptance of an offer which came from the creditor.<sup>25</sup> Or, as it is sometimes said in these cases, the creditor has given his notice of acceptance in advance, and the guarantor, when he gives the guaranty, knows that it will be accepted.

504; *Bank of Newbury v. Sinclair*, 60 N. H. 100, 49 Am. Rep. 307; *Cowan v. Roberts*, 134 N. C. 415, 46 S. E. 979, 65 L. R. A. 729, 101 Am. St. Rep. 845; *Bay v. Thompson*, 1 Pears. (Pa.) 551; *Ruberg v. Brown*, 71 S. C. 287, 51 S. E. 96; *Johnson v. Bailey*, 79 Tex. 516, 15 S. W. 499; 25 Cent. Dig. col. 26.

<sup>23</sup> *And v. Magruder*, 10 Cal. 282; *Bond v. Storrs*, 13 Conn. 412; *Snyder v. Click*, 112 Ind. 293, 13 N. E. 581; *Rice v. Cook*, 71 Me. 559; *Moles v. Bird*, 11 Mass. 436, 6 Am. Dec. 179; *Perkins v. Goodman*, 21 Barb. (N. Y.) 218; *Smith v. Dann*, 6 Hill (N. Y.) 543; *Keller's Adm'r v. McHuffman*, 15 W. Va. 64; *Dart v. Sherwood*, 7 Wis. 523, 76 Am. Dec. 228.

<sup>24</sup> *Drucker v. Heyl-Dia* (Sup.) 101 N. Y. Supp. 796; *Lawton v. Maner*, 9 Rich. Law (S. C.) 335; *DAVIS v. WELLS*, 104 U. S. 159, 26 L. Ed. 686.

<sup>25</sup> Where C. writes P., who desires to buy goods from the former, that if S. will guaranty payment the goods will be sold, and S. writes C. in reply that he will guaranty, no formal notice of acceptance is required. *Cooke v. Orne*, 37 Ill. 186. A request to guaranty will be implied, where the maker of notes knows that they will not be accepted without. *Ricketson v. Giles*, 91 Ill. 154.

*Recital of Consideration.*

Where the guaranty recites a consideration moving to the guarantor, acceptance is evidenced by such recital.<sup>26</sup> Such was the case where a letter of credit stated that it had been given in consideration of one dollar received from the creditor, although the consideration never was paid, and the letter of credit was the initial step in the transaction.<sup>27</sup>

*Bilateral Contracts.*

If the contract has been signed by both parties, the fact that it has been executed indicates notice of acceptance.<sup>28</sup>

*Lack of Injury.*

If the guarantor is not injured by a failure to be given notice, he cannot set up the lack thereof as a defense, as the theory of the law, in requiring notice to be given, is to enable the guarantor to take steps to protect himself, so that he may not be injured by a change in the financial condition of the principal.<sup>29</sup> If the principal was insolvent at the time of giving the guaranty, the guarantor is not injured by lack of notice, as he is in no worse situation than he was at the time of giving the guaranty; nor is he injured if the principal be solvent at the time demand is made upon the guarantor, for he can recover from the principal any sums that he is required to pay on account of the principal.<sup>30</sup>

*Waiver of Notice.*

The right of a guarantor to notice may be waived by him. The original offer expressly may waive notice;<sup>31</sup> or waiver

<sup>26</sup> Solary v. Stultz, 22 Fla. 263; Buhner v. Baldwin, 137 Mich. 263, 100 N. W. 468; DAVIS v. WELLS, 104 U. S. 164, 26 L. Ed. 686. Contra, Farmers' Bank v. Tatnall, 7 Houst. (Del.) 287, 81 Atl. 879.

<sup>27</sup> Taylor v. Tolman, 47 Ill. App. 264; Furst & Bradley Mfg. Co. v. Black, 111 Ind. 308, 12 N. E. 504; Howe v. Nickels, 22 Me. 175; March v. Putney, 56 N. H. 84; Johnson v. Bailey, 79 Tex. 516, 15 S. W. 499.

<sup>28</sup> Cooke v. Orne, 37 Ill. 186; Neagle v. Sprague, 63 Ill. App. 25; Bechtold v. Lyon, 130 Ind. 194, 29 N. E. 912; Lehigh Coal & Iron Co. v. Scallen, 61 Minn. 63, 63 N. W. 245; Wildes v. Savage, 1 Story (U. S.) 22, Fed. Cas. No. 17,653.

<sup>29</sup> See ante, note 18.

<sup>30</sup> See post, § 38.

<sup>31</sup> Davis v. Wells, 104 U. S. 159, 26 L. Ed. 686.

may be implied from his acts and declarations.<sup>32</sup> The implication may arise at the time the offer is made, or after default. His original offer might stipulate for notice of default only, in which case, by stipulating for one kind of notice, he impliedly waives notice of acceptance.<sup>33</sup>

His right to set up lack of notice as a defense may be waived after default, by recognizing liability on the guaranty and promising to make it good.<sup>34</sup>

*Approval of Official Bonds.*

Where a bond for the faithful performance of services of a public officer is given, it is required generally to be approved; but such approval is for the benefit of the public, and a surety cannot offer as a defense that the bond never was approved formally.<sup>35</sup> The approval of a bond will be presumed from its acceptance and retention without objection.<sup>36</sup> The fact that the bond is regarded as insufficient, or is returned for

<sup>32</sup> Trefethen v. Locke, 16 La. Ann. 19.

<sup>33</sup> Wadsworth v. Allen, 8 Grat. (Va.) 174, 56 Am. Dec. 137.

<sup>34</sup> Farwell v. Sully, 38 Iowa, 387; Peck v. Barney, 13 Vt. 93.

If the offeror, as a precaution in case the creditor seeks to hold him liable, takes collateral security from the principal debtor, he does not waive notice. William Deering & Co. v. Mortell (S. D. 1906) 110 N. W. 86.

<sup>35</sup> People v. Huson, 78 Cal. 154, 20 Pac. 309; Crawford v. Howard, 9 Ga. 314; Trustees of Schools v. Shelk, 119 Ill. 579, 8 N. E. 189; Peelle v. State, 118 Ind. 512, 21 N. E. 288; Held v. Bagwell, 58 Iowa, 139, 12 N. W. 226; McCracken v. Todd, 1 Kan. 148; Heath v. Shrempp, 22 La. Ann. 167; Young v. State, 7 Gill & J. (Md.) 253; Inhabitants of Wendell v. Fleming, 74 Mass. (8 Gray) 613; Carmichael v. Governor, 4 Miss. (3 How.) 236; Jones v. State, 7 Mo. 81, 37 Am. Dec. 180; Paxton v. State, 59 Neb. 460, 81 N. W. 383, 80 Am. St. Rep. 689; Skellinger v. Yendes, 12 Wend. (N. Y.) 306; Mundorff v. Wangler, 44 N. Y. Super. Ct. (12 Jones & S.) 495; Musselman v. Com., 7 Pa. (7 Barr) 240; Treasurers v. Stevens, 2 McCord (S. C.) 107; State, to Use of Treasure Stove Works, v. Proudfoot, 38 W. Va. 736, 18 S. E. 949; U. S. v. Le Baron, 19 How. (U. S.) 73, 15 L. Ed. 525; 40 Cent. Dig. col. 1700. The fact that some of the directors approving a bond are sureties thereon does not affect the validity of the bond. Amherst Bank v. Root, 2 Metc. (Mass.) 522.

<sup>36</sup> Boyd v. Agricultural Ins. Co., 20 Colo. App. 28, 76 Pac. 986; Pierce v. Richardson, 37 N. H. 306; Postmaster General v. Norvell, Gilp. (U. S.) 106, Fed. Cas. No. 11,810.

additional sureties, does not indicate that those who have signed are not accepted.\*

#### TIME OF ACCEPTANCE.

38. Notice of acceptance must be given within a reasonable time.

#### FORM OF NOTICE OF ACCEPTANCE.

39. No particular form of notice is required.

#### *Time of Acceptance.*

In those states where notice of acceptance is required, it is not necessary that it be given as soon as the offer is received, but it is sufficient if given within a reasonable time thereafter.<sup>37</sup> What is a reasonable time depends upon circumstances.<sup>38</sup> In one case, a delay of ten months was not fatal, the principal continuing solvent;<sup>39</sup> while, in another case, four months was deemed too late.<sup>40</sup>

\*Cawley v. People, 95 Ill. 249; Van Dwyne v. Coope, 1 Hill (N. Y.) 557; Decker v. Anderson, 39 Barb. (N. Y.) 346; Postmaster General v. Norvell, Gilp. (U. S.) 106, Fed. Cas. No. 11,310.

<sup>37</sup> Cahuzac v. Samini, 29 Ala. 288; McCollum v. Cushing, 22 Ark. 540; Craft v. Isham, 13 Conn. 28; Taylor v. McClung, 2 Houst. (Del.) 24; Claflin v. Briant, 58 Ga. 414; Meyer v. Ruhstadt, 66 Ill. App. 346; Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279; Estey v. Murphy, 7 Ky. Law Rep. 596; Seaver v. Bradley, 6 Me. (6 Greenl.) 60; Mussey v. Rayner, 39 Mass. (22 Pick.) 223; Winnebago Paper Mills v. Travis, 56 Minn. 480, 53 N. W. 36; Ellis v. Jones, 70 Miss. 60, 11 South. 566; Smith v. Anthony, 5 Mo. 504; Evans v. McCormick, 167 Pa. 247, 31 Atl. 563; Wilkins v. Carter, 84 Tex. 438, 19 S. W. 997; Louisville Mfg. Co. v. Welch, 10 How. (U. S.) 461, 13 L. Ed. 497.

<sup>38</sup> Howe v. Nickels, 22 Me. 178; Montgomery v. Kellogg, 43 Miss. 486, 5 Am. Rep. 508.

<sup>39</sup> Seaver v. Bradley, 6 Me. (6 Greenl.) 60. In Lowry v. Adams, 22 Vt. 100, the delay was two months.

<sup>40</sup> Schlessinger v. Dickinson, 5 Allen (Mass.) 47. In Mussey v. Rayner, 22 Pick. (Mass.) 223, the delay was two years and nine months; and in Allen v. Pike, 3 Cush. (Mass.) 238, three years.

*Form of Notice.*

The law does not require that notice of acceptance shall be in any precise form of words, nor even in writing.<sup>41</sup> It is sufficient if the guarantor learn, in any manner, that his offer has been accepted.<sup>42</sup> If the object of notice is to enable the guarantor to protect himself against possible future loss by his dealings with the principal, that object is accomplished if the guarantor learns that credit has been extended to the principal upon the strength of his guaranty. Notice may be inferred from facts and circumstances.<sup>43</sup> The question whether sufficient notice has been given is one of fact for the jury.<sup>44</sup>

Where the guaranty is joint, notice to one of the guarantors will be sufficient.<sup>45</sup>

If notice be sent by mail, it is sufficient, though it never reach its destination.<sup>46</sup>

**REVOCATION OF OFFER.**

**40. An offer to become a surety may be revoked before it is acted upon.**

As there cannot be a contract until an offer is accepted, it follows that a person, having made an offer to guaranty, can

<sup>41</sup> *Montgomery v. Kellogg*, 43 Miss. 486, 5 Am. Rep. 508; *Oaks v. Weller*, 16 Vt. 70; *Reynolds v. Douglass*, 12 Pet. (U. S.) 497, 9 L. Ed. 1171.

<sup>42</sup> *Bascom v. Smith*, 164 Mass. 61, 41 N. E. 130; *John A. Tolman Co. v. Means*, 52 Mo. App. 385; *Lawton v. Maner*, 9 Rich. Law (S. C.) 335; *Train v. Jones*, 11 Vt. 444.

<sup>43</sup> *Ruffner v. Love*, 33 Ill. App. 601; *Montgomery v. Kellogg*, 43 Miss. 486, 5 Am. Rep. 508; *Pearsell Mfg. Co. v. Jeffreys*, 183 Mo. 386, 81 S. W. 901, 105 Am. St. Rep. 496; *Lawton v. Maner*, 9 Rich. Law (S. C.) 335. The mere fact that the guarantor and the principal were connected by marriage, and had business dealings with each other, does not indicate notice. *Craft v. Isham*, 18 Conn. 23.

<sup>44</sup> *Walker v. Forbes*, 25 Ala. 139, 60 Am. Dec. 498; *Williams v. Staton*, 5 Smedes & M. (Miss.) 347; *Lowry v. Adams*, 22 Vt. 160; *Lawrence v. McCalmont*, 2 How. (U. S.) 426, 11 L. Ed. 326. The question whether notice has been given within a reasonable time is also a question of fact for the jury. *Central Sav. Bank v. Shine*, 48 Mo. 456, 8 Am. Rep. 112.

<sup>45</sup> *MAYNARD v. MORSE*, 36 Vt. 617.

<sup>46</sup> *Bishop v. Eaton*, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437.

withdraw his offer at any time before its acceptance.<sup>47</sup> Where the initial step has come from the person who intends to become a guarantor, there is no consideration for the contract, and no liability is imposed until the offer has been acted upon. At that stage in the negotiations, neither party is bound. If the offer be joint, a withdrawal by one revokes it as to the others.<sup>48</sup>

Likewise, sureties upon a bond are at liberty to revoke the bond at any time prior to their acceptance by the obligee.<sup>49</sup>

Revocation, however, should be clear and explicit, and leave no room for doubt as to the intention.<sup>50</sup>

#### DELIVERY OF CONTRACT.

**41. Where a contract of suretyship has been embodied in a written instrument, it is not complete until the delivery of the instrument.**

##### *Necessity of Delivery.*

The rule of contracts is that, where the parties to a contract have drawn up a formal instrument, incorporating the terms of their agreement therein, and regard the written instrument as the contract, the contract does not become complete until the delivery of such instrument to the party who can enforce it.<sup>51</sup> For this reason, where a promissory note, after being handed to the payee, was returned by him to the

<sup>47</sup> *Potter v. Gronbeck*, 117 Ill. 404, 7 N. E. 586; *Durham v. Bischof*, 47 Ind. 211; *Jordan v. Dobbins*, 122 Mass. 168, 23 Am. Rep. 305; *Offord v. Davle*, 12 J. Scott (N. S.) 748.

<sup>48</sup> *Potter v. Gronbeck*, 117 Ill. 404, 7 N. E. 586.

<sup>49</sup> *Covert v. Shirk*, 58 Ind. 264; *Gourdln v. Read*, 8 Rich. Law (S. C.) 230.

<sup>50</sup> *Ianusse v. Barker*, 3 Wheat. (U. S.) 101, 4 L. Ed. 343.

<sup>51</sup> *Brooks v. People*, 15 Ill. App. 570; *Hill v. Dunham*, 7 Gray, 543; *Hall v. Parker*, 37 Mich. 590, 26 Am. Rep. 540; *State v. Young*, 23 Minn. 551; *Benjamin v. Ver Nooy*, 36 App. Div. 581, 55 N. Y. Supp. 796; *Commonwealth v. Kendig*, 2 Pa. 448; *Lovejoy v. Whipple*, 18 Vt. 379, 46 Am. Dec. 157; *Thomas v. Watkins*, 16 Wis. 549. It is otherwise with the memorandum required by the statute of frauds, which is informal, written evidence of an oral agreement, and need not be delivered. See post, § 87.

maker with directions to obtain the signature of a surety thereon, and the maker procured the signature of a surety, but refused to redeliver the note to the payee, the payee could not hold the person who had signed as surety.<sup>52</sup> So, a bond given for the faithful performance of the duties of an officer has no validity until it has been delivered, although it may be completely executed.

*Delivery by Agent.*

Delivery may be made by an agent; and the principal may be, and is, very frequently, the agent of the surety for the delivery of the instrument, and has implied authority to deliver the contract for the sureties;<sup>53</sup> but delivery by a stranger,<sup>54</sup> as, for illustration, by one who has found the instrument, would not be delivery.<sup>55</sup>

*What Constitutes Delivery.*

To constitute delivery, there must be either an actual manual transfer of possession to the creditor or obligee, or such a disposition of it as precludes the further control over the instrument by the parties liable thereon.

A delivery to one of several obligees is sufficient.<sup>56</sup>

*Delivery to Agent.*

Delivery may be made to the agent of the creditor or obligee; but the principal cannot be regarded as his agent,<sup>57</sup> and retention of possession by the principal is inconsistent with delivery.

Where delivery has been made to an authorized agent of the creditor or obligee, it is sufficient, although the instrument never comes into the actual possession of the latter.

<sup>52</sup> Chamberlain v. Hopps, 8 Vt. 94.

<sup>53</sup> Pequawket Bridge v. Mathes, 8 N. H. 139; King County v. Ferry, 5 Wash. 536, 32 Pac. 538, 19 L. R. A. 500, 34 Am. St. Rep. 880.

<sup>54</sup> Fay v. Richardson, 24 Mass. (7 Pick.) 91. Delivery by a custodian in violation of instructions is not a good delivery. People v. Bostwick, 82 N. Y. 445, affirming 43 Barb. (N. Y.) 9.

<sup>55</sup> See post, § 43.

<sup>56</sup> Moss v. Riddle, 5 Oranch (U. S.) 351, 3 L. Ed. 123.

<sup>57</sup> Chamberlain v. Hopps, 8 Vt. 94.



*Filing Official Bond.*

Sometimes a statute requires that the bond of a public officer shall be filed within a certain time, and provides that the office shall be deemed vacant if the bond has not been filed within that time. Such statutory provisions, however, are regarded as directory merely, and not mandatory, and default as to the time of filing may be waived by the authorities, and sureties upon bonds filed after the time specified would be nevertheless liable.<sup>58</sup>

**SIGNING ON CONDITION.**

- 42. Delivery of an instrument, which has been signed by a surety on condition, and the condition has not been complied with, will bind the surety if the obligee or creditor have no notice, actual or constructive, of such condition.**

**NOTICE OF CONDITIONS.****43. Constructive notice arises—**

- (a) Where delivery is made by a stranger.
- (b) Where the instrument is incomplete upon its face.

One of the defenses which is frequently made by a surety is that he signed the instrument on conditions which never were complied with. If the creditor or obligee have notice of these conditions, he cannot hold the surety.<sup>59</sup> This notice

<sup>58</sup> *City of Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182; *State, to Use of Mayor, etc., of Town of Peru, v. Porter*, 7 Ind. 204; *State ex rel. Attorney General v. Churchill*, 41 Mo. 41; *People v. Holley*, 12 Wend. (N. Y.) 481.

<sup>59</sup> *Evans v. Daughtry*, 84 Ala. 68, 4 South. 592; *Crawford v. Foster*, 6 Ga. 202, 50 Am. Dec. 327; *Belleville Sav. Bank v. Bornman*, 124 Ill. 200, 16 N. E. 210; *Barber v. Ruggles*, 87 S. W. 785, 27 Ky. Law Rep. 1077; *Clements v. Cassilly*, 4 La. Ann. 380; *School Dist. No. 80 v. Lapping* (Minn. 1907) 110 N. W. 849; *Goff v. Bankston*, 35 Miss. 518; *Hill v. Sweetser*, 5 N. H. 168; *Bronson v. Noyes*, 7 Wend. (N. Y.) 188; *Cowan v. Baird*, 77 N. C. 201; *Miller v. Stem*, 12 Pa. 383; *Smith v. Doak*, 8 Tex. 215; *Fletcher v. Austin*, 11 Vt. 447, 34 Am. Dec. 698; *King v. Smith*, 2 Leigh (Va.) 157; *United States v. Hammond*, 4 Biss. 283, Fed. Cas. No. 15,292; 40 Cent. Dig. col. 1682.

may be actual or implied. Actual notice arises where he has knowledge of the facts. Constructive notice arises where he has no knowledge of the facts, but circumstances connected with the delivery, or the appearance of the instrument, put him on inquiry.<sup>60</sup>

As the surety is generally a reluctant party to the contract, it frequently happens, when the principal presents the contract to him for his signature, that he asks who else the principal intends to have sign, and, upon being informed of others, he signs, remarking that he does so on condition that the instrument shall not be delivered unless executed by the others mentioned by the principal. If the principal neglect or fail to obtain the other signatures, the temptation may be great to deliver the instrument in violation of the conditions imposed by the surety who has signed. If the creditor or obligee act in good faith,<sup>61</sup> the surety is bound, as the surety has

<sup>60</sup> *Sharp v. Allgood*, 100 Ala. 183, 14 South. 16; *State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880; *Markland Min. & Mfg. Co. v. Kimmel*, 87 Ind. 560; *Johnson v. Weatherwax*, 9 Kan. 75; *Inhabitants of Readfield v. Shaver*, 50 Me. 36, 79 Am. Dec. 592; *Thomas v. Bleakie*, 136 Mass. 568; *Hessell v. Johnson*, 68 Mich. 623, 30 N. W. 209, 6 Am. St. Rep. 334; *Fales v. Filley*, 2 Mo. App. 345; *Outler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371; *Ordinary of State of New Jersey v. Thatcher*, 41 N. J. Law, 403, 32 Am. Rep. 225; *State ex rel. Barnes v. Lewis*, 73 N. C. 138, 21 Am. Rep. 461; *Fertig v. Bucher*, 3 Pa. 308; *Fletcher v. Austin*, 11 Vt. 447, 34 Am. Dec. 698; *Preston v. Hull*, 23 Grat. (Va.) 600, 14 Am. Rep. 153; *Pawling v. United States*, 4 Cranch (U. S.) 219, 2 L. Ed. 601.

<sup>61</sup> *Wilson v. King*, 59 Ark. 32, 26 S. W. 18, 23 L. R. A. 802; *Tidball v. Halley*, 48 Cal. 610; *Byers v. Gilmore*, 10 Colo. App. 79, 50 Pac. 370; *Mathis v. Morgan*, 72 Ga. 517, 53 Am. Rep. 847; *Rhode v. McLean*, 101 Ill. 467; *Mowbray v. State*, 88 Ind. 324; *Benton County Sav. Bank of Norway v. Boddicker*, 105 Iowa, 548, 75 N. W. 632, 45 L. R. A. 321, 67 Am. St. Rep. 310; *Hall v. Smith*, 14 Bush (Ky.) 604; *City of Lewiston v. Gagne*, 89 Me. 395, 36 Atl. 629, 56 Am. St. Rep. 432; *Harris v. Regester*, 70 Md. 109, 16 Atl. 386; *Thomas v. Bleakie*, 136 Mass. 568; *Township of Crystal Lake v. Hill*, 109 Mich. 246, 67 N. W. 121; *WARD v. HACKETT*, 30 Minn. 150, 14 N. W. 578, 44 Am. Rep. 187; *State v. Allen*, 69 Miss. 508, 10 South. 473, 30 Am. St. Rep. 563; *North Atchison Bank v. Gay*, 114 Mo. 203, 21 S. W. 479; *Brumback v. German Bank*, 46 Neb. 540, 65 N. W. 198; *Merriam v. Rockwood*, 47 N. H. 81; *Wolf v. Driggs*, 44 N. J. Eq. 363, 14 Atl. 480; *Russell v. Freer*, 56 N. Y. 67; *Cowan v. Roberts*, 134 N. C. 415, 46 S. E. 979, 65 L. R. A. 729, 101 Am. St. Rep. 845; *Baker*

clothed the principal with apparent authority as his agent to make delivery.<sup>62</sup> Where a fraud has been perpetrated, from which one of two innocent parties must suffer, he who put it in the power of a third person to commit the fraud, must bear the loss. The rule applies as well to other conditions annexed by the surety.<sup>63</sup>

*Constructive Notice—Delivery by a Stranger.*

Delivery by any other than a party to the instrument, however, should put the creditor or obligee on inquiry as to how it came into the possession of the person making delivery, and such inquiry might result in learning of the conditions.<sup>64</sup>

*Constructive Notice—Incomplete Instrument.*

If the instrument be a bond, and there are names of persons appearing in the body of the bond who have not signed, a person of reasonable prudence would investigate, and thus dis-

County v. Huntington, 46 Or. 275, 79 Pac. 187; Whitaker v. Richards, 134 Pa. 191, 19 Atl. 501, 7 L. R. A. 749, 19 Am. St. Rep. 684; Dun v. Garrett, 93 Tenn. (9 Pickle) 650, 27 S. W. 1011, 42 Am. St. Rep. 937; Seaton v. McReynolds (Tex. Civ. App.) 72 S. W. 874; Probate Court for Washington Dist. v. St. Clair, 52 Vt. 24; Nash v. Fugate, 24 Grat. (Va.) 202, 18 Am. Rep. 640; Id., 32 Grat. (Va.) 595, 34 Am. Rep. 780; Lytle v. Cozad, 21 W. Va. 183; Belden v. Hurlbut, 94 Wis. 562, 69 N. W. 357, 37 L. R. A. 853; Butler v. United States, 21 Wall. (U. S.) 274, 22 L. Ed. 614. Contra, Sharp v. Allgood, 100 Ala. 183, 14 South. 16.

<sup>62</sup> Smith v. Peoria County, 59 Ill. 412; State ex rel. McCarty v. Pepper, 31 Ind. 76; State v. Peck, 53 Me. 284; McCormick v. Bay City, 23 Mich. 457; State, to Use of Bothrick, v. Potter, 63 Mo. 212, 21 Am. Rep. 440; Cutler v. Roberts, 7 Neb. 4, 29 Am. Rep. 371; Dair v. United States, 16 Wall. (U. S.) 1, 21 L. Ed. 491.

<sup>63</sup> Gage v. Sharp, 24 Iowa, 15; Carter v. Moulton, 51 Kan. 9, 32 Pac. 633, 20 L. R. A. 309, 37 Am. St. Rep. 259; Thomas v. Bleakie, 136 Mass. 568; Small v. Smith, 1 Denio (N. Y.) 583; Fowler v. Allen, 32 S. C. 229, 10 S. E. 947, 7 L. R. A. 745; Merritt v. Duncan, 7 Helsk. (Tenn.) 156, 19 Am. Rep. 612; Bowman v. Van Kuren, 29 Wis. 209, 9 Am. Rep. 554. Where a surety signs on condition that another sign as co-surety with him, and the latter signs as a supplemental surety, the surety is bound if the creditor does not have notice. Bobbitt v. Shryer, 70 Ind. 513; Adams v. Flanagan, 36 Vt. 400; Melms v. Werdehoff, 14 Wis. 18.

<sup>64</sup> Taylor Co. v. King, 73 Iowa, 153, 34 N. W. 774, 5 Am. St. Rep. 606; McCormick Harvesting Mach. Co. v. McKee, 51 Mich. 426, 16 N. W. 796.

cover that the delivery was not authorized; and, if the creditor or obligee fail to make such investigation, the surety who has signed on condition is not bound.<sup>65</sup> It must not be supposed, however, that a surety is not bound whenever names appear in the body of the instrument which are not appended as signatures thereto,<sup>66</sup> nor is there any presumption raised that those who have signed imposed any conditions that others should sign.<sup>67</sup> They may have been willing to be bound with-

<sup>65</sup> *State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880; *Markland Min. & Mfg. Co. v. Kimmel*, 87 Ind. 500; *Hall v. Smith*, 14 Bush (Ky.) 604; *Hessell v. Johnson*, 63 Mich. 623, 30 N. W. 209, 6 Am. St. Rep. 334; *Outler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371; *State Bank at Trenton v. Evans*, 15 N. J. Law, 155, 28 Am. Dec. 400; *Warfel v. Frantz*, 76 Pa. 88; *Preston v. Hull*, 23 Grat. (Va.) 600, 14 Am. Rep. 153; *Pawling v. United States*, 4 Cranch (U. S.) 219, 2 L. Ed. 601.

<sup>66</sup> *People v. Stacy*, 74 Cal. 373, 16 Pac. 192; *Trustees of Schools v. Sheik*, 119 Ill. 579, 8 N. E. 189; *Whitaker v. Richards*, 134 Pa. 191, 19 Atl. 501, 7 L. R. A. 749, 19 Am. St. Rep. 684. If a bond be delivered to the obligee by a part of the obligors, it will be binding on them. *State v. Peck*, 53 Me. 284. A statute may annex the condition, as a requirement that more than one surety should sign. *Sharp v. United States*, 4 Watts (Pa.) 21, 28 Am. Dec. 676.

<sup>67</sup> *City of Los Angeles v. Mellus*, 59 Cal. 444; *Towns v. Kellett*, 11 Ga. 286; *Johnson v. Weatherwax*, 9 Kan. 75; *Inhabitants of Readfield v. Shaver*, 50 Me. 36, 79 Am. Dec. 592; *State ex rel. Moore v. Sandusky*, 46 Mo. 377; *Mullen v. Morris*, 48 Neb. 596, 62 N. W. 74; *Blume v. Bowman*, 24 N. C. 338; *Whitaker v. Richards*, 134 Pa. 191, 19 Atl. 501, 7 L. R. A. 749, 19 Am. St. Rep. 684; *Ward v. Churn*, 18 Grat. (Va.) 801, 98 Am. Dec. 749. In some states, while there is no presumption that any condition was annexed in regard to others signing as sureties, there is a presumption that there was a condition imposed that the principal would sign. *Clements v. Cassilly*, 4 La. Ann. 380; *Dole Bros. Co. v. Preserving Co.*, 167 Mass. 481, 46 N. E. 105, 57 Am. St. Rep. 477; *Hall v. Parker*, 39 Mich. 287; *Safranski v. St. Paul Co.*, 72 Minn. 185, 75 N. W. 17; *Gay v. Murphy*, 134 Mo. 98, 34 S. W. 1091, 56 Am. St. Rep. 496; *Board of Education of Rapid City v. Sweeney*, 1 S. D. 642, 48 N. W. 302, 36 Am. St. Rep. 767. But in other states there is no presumption even as to the principal. *Trustees of Schools v. Sheik*, 119 Ill. 579, 8 N. E. 189; *Hickman v. Fargo*, 1 Kan. App. 695, 42 Pac. 381; *City of Deering v. Moore*, 86 Me. 181, 29 Atl. 983, 41 Am. St. Rep. 534; *Cockrill v. Davie*, 14 Mont. 131, 35 Pac. 958; *Bollman v. Pasewalk*, 22 Neb. 761, 36 N. W. 134; *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131; *Eureka Sandstone Co. v. Long*, 11 Wash. 161, 39 Pac. 446; *Douglas County v. Bardon*, 79 Wis. 641, 48 N. W. 969. In California, if the

out the others. The rule applies to cases only where the sureties who have signed have annexed conditions which would have been discovered by the creditor or obligee by inquiry. If conditions had not been imposed, none could have been discovered. Conditions may have been imposed by one, or any number less than all, of the sureties, in which case those who signed without condition will be bound.<sup>68</sup> This shows the importance of a personal interview, by one who contemplates becoming a surety, with those whom he expects to become co-sureties with him, in order to ascertain their exact intentions.

Notice to an agent of the creditor is notice to the creditor. Thus, a bank is bound by a condition, communicated to its agent, that a note is not to be binding upon a surety who has signed unless it is signed by another specified person.<sup>69</sup>

The creditor or obligee cannot escape knowledge by failure to read the instrument, and he is bound by everything that he might have seen by an inspection of it.<sup>70</sup> Thus, he is held to constructive notice of a pencil memorandum written thereon.

A distinction seems to be taken between a surety signing upon condition that another shall sign and a promise that the principal will procure such signature. In the latter case, the principal violates his promise to the surety and would be liable therefor; but that does not affect the rights of the creditor or obligee. If, at the time of signing, the surety should say to his principal, "I sign this on condition that you sign," or even, "Don't deliver this until you sign," a condition is annexed, and the surety will not be liable to a creditor with notice; but if the surety says, "You'll sign this before you

obligation is joint and several, there is no presumption that a surety signed on condition that the principal would sign also. *Kurtz v. Forquer*, 94 Cal. 91, 29 Pac. 413. But it is otherwise if the obligation be joint only. *Weir v. Mead*, 101 Cal. 125, 35 Pac. 567, 40 Am. St. Rep. 46.

<sup>68</sup> *Cutler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371.

<sup>69</sup> *Commercial Bank v. Smith*, 34 Nova Sco. 426.

<sup>70</sup> *Benton County Sav. Bank of Norway v. Boddicker*, 105 Iowa, 548, 75 N. W. 632, 45 L. R. A. 321, 67 Am. St. Rep. 310; *Crystal Lake Tp. v. Hill*, 109 Mich. 246, 67 N. W. 121; *Mullen v. Morris*, 43 Neb. 596, 62 N. W. 74; *Cutler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371.

deliver, won't you?" and the principal promises to do so, there is no condition attached by the surety, but he has asked and obtained a promise only from the principal to do a certain act, which agreement the principal violates.<sup>71</sup>

It is no defense to a surety that he signed a contract on the supposition that similar contracts would be executed by others.<sup>72</sup>

If conditions have been attached to the delivery of the instrument, of which the obligee is aware, his assent thereto will be presumed from acceptance.<sup>73</sup> Unperformed conditions, known to the payee of a negotiable instrument, cannot be set up against a purchaser for value without notice.<sup>74</sup>

#### SIGNING ON CONDITION—FILLING BLANK SPACES.

##### 44. A surety who signs an instrument with blank spaces therein is bound by the act of his principal in filling them.

A surety who signs his name to a blank paper, or who signs an instrument in which there are blanks, impliedly authorizes the principal, as his agent, to fill such blanks in such a manner as to make it a valid contract;<sup>75</sup> and, if the principal violates

<sup>71</sup> Trustees of Schools v. Shelk, 119 Ill. 579, 8 N. E. 189.

<sup>72</sup> COOPE v. TWYNAM, Turn. & Russ. 426; Pendlebury v. Walker, 4 Y. & C. 424.

<sup>73</sup> Ward v. Churn, 18 Grat. (Va.) 801, 98 Am. Dec. 749.

<sup>74</sup> Marks v. First Nat. Bank, 79 Ala. 550, 58 Am. Rep. 620.

<sup>75</sup> Dolbeer v. Livingston, 100 Cal. 617, 35 Pac. 328; State ex rel. McCarty v. Pepper, 31 Ind. 76; Rose v. Douglass Tp., 52 Kan. 451, 34 Pac. 1046, 39 Am. St. Rep. 354; Inhabitants of South Berwick v. Huntress, 53 Me. 89, 87 Am. Dec. 535; Smith v. Crooker, 5 Mass. 538; McCormick v. Bay City, 23 Mich. 457; State v. Young, 23 Minn. 551; Kinney v. Schmitt, 12 Hun (N. Y.) 521; Simpson's Ex'r v. Bo- vard, 74 Pa. (24 P. F. Smith) 351; BUTLER v. UNITED STATES, 88 U. S. (21 Wall.) 272, 22 L. Ed. 614. The true date of the execution of a promissory note may be inserted. Emmons v. Meeker, 55 Ind. 321; Patton v. Shanklin, 53 Ky. (14 B. Mon.) 15; Androscoggin Bank v. Kimball, 64 Mass. (10 Cush.) 373; Mitchell v. Culver, 7 Cow. (N. Y.) 336; Page v. Morrell, 33 How. Prac. (N. Y.) 244. The payee's name. Rich v. Starbuck, 51 Ind. 87. The names of other sureties. Boyd v. Agricultural Ins. Co., 20 Colo. App. 28, 76 Pac. 966. The penalty. White v. Duggan, 140 Mass. 18, 2 N. E. 110, 54

his instructions in regard to the manner of filling the blanks, the surety is bound nevertheless, in the absence of knowledge on the part of the creditor, as he is bound by the acts of his agent.<sup>76</sup>

Am. Rep. 437; *Rollins v. Ebbs*, 138 N. C. 140, 50 S. E. 577, reversing 137 N. C. 355, 49 S. E. 341. A surety is estopped to question the validity of a bond which he signed in blank. *Willis v. Rivers*, 80 Ga. 556, 7 S. E. 90; *Wright v. Harris*, 31 Iowa, 272. The surety would be bound, of course, if by his subsequent acts he ratified the act of the principal in filling the blanks. *Bartlett v. Board of Education*, 59 Ill. 364. And, in any event, the principal would be bound, whether the sureties are or not. *Penn v. Hamlett*, 27 Grat. (Va.) 337.

<sup>76</sup> *City of Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182, reversing *Gage v. Chicago*, 2 Ill. App. (2 Bradw.) 332; *Chalaron v. McFarlane*, 9 La. 227; *White v. Duggan*, 140 Mass. 18, 2 N. E. 110, 54 Am. Rep. 437; *Schryver v. Hawkes*, 22 Ohio St. 308; *Stahl v. Berger*, 10 Serg. & R. (Pa.) 170, 13 Am. Dec. 666; *Gary v. State*, 11 Tex. App. 527. In *Cross v. State Bank*, 5 Ark. 525, and *Rhea v. Gibson's Ex'r*, 10 Grat. (Va.) 215, the contrary rule is held, and the surety in such cases is not liable. In some states, while the rule is as stated in the text as to instruments not under seal, it is otherwise as to bonds, and a surety is held not to be liable if he signed a sealed instrument containing blanks, even though the blanks were filled afterwards in accordance with his instructions. *Richmond Mfg. Co. v. Davis*, 7 Blackf. (Ind.) 412; *Lockart v. Roberts*, 3 Bibb (Ky.) 361; *Byers v. McClanahan*, 6 Gill & J. (Md.) 250; *Williams v. Crutcher*, 6 Miss. 71, 35 Am. Dec. 422; *Richards v. Day*, 137 N. Y. 183, 33 N. E. 146, 23 L. R. A. 601, 33 Am. St. Rep. 704; *Barden v. Southerland*, 70 N. C. 528; *Famulener v. Anderson*, 15 Ohio St. 473; *Mosby v. Arkansas*, 4 Sneed (Tenn.) 324. But in other states no distinction is made between a sealed and unsealed instrument, and a surety who signs an obligation under seal with blanks therein is bound. *Gibbs v. Frost*, 4 Ala. 720; *Lee Co. v. Welsing*, 70 Iowa, 198, 30 N. W. 481; *Rose v. Douglass Tp.*, 52 Kan. 451, 34 Pac. 1046, 39 Am. St. Rep. 354; *Inhabitants of South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535; *State v. Young*, 23 Minn. 551; *Greene County, to Use of Sims, v. Wilhite*, 29 Mo. App. 459; *Ex parte Kerwin*, 8 Cow. 118; *Willey v. Moore*, 17 Serg. & R. (Pa.) 438, 17 Am. Dec. 696; *Mills v. Williams*, 16 S. C. 593. A surety who signs a negotiable instrument with blanks therein is liable to a purchaser for value without notice of a violation of his instructions as to the manner in which the blanks should be filled. *Roberson v. Blevins*, 57 Kan. 50, 45 Pac. 63; *Fullerton v. Sturges*, 4 Ohio St. 529; *Wessell v. Glenn*, 108 Pa. 104; *Frazier v. Gains*, 61 Tenn. (2 Baxt.) 92; *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39.

A principal may obtain as many additional sureties as he may require to make the instrument available for the purpose for which it is intended.<sup>77</sup>

**FAILURE OF PRINCIPAL TO EXECUTE BOND.**

**45. In some, though not in all, jurisdictions, a surety on a bond is bound, although not executed by the principal.**

There is a conflict of authority whether the omission of the signature of the principal, his name appearing in the body of the obligation, will affect the liability of the surety. In some jurisdictions it is held that the omission of the signature of the principal is a mere technical defect.<sup>78</sup> The principal would be liable without any formal contract. A public officer is liable for a breach of his official duties, and such liability may be enforced under the common law, whether he has or has not given a bond,<sup>79</sup> and the sureties are not injured by the failure of the principal to sign; for, if they are compelled to pay because of the default of their principal, they can have indemnity from him whether he signed or not.<sup>80</sup> In other

<sup>77</sup> *Oldham v. Broom*, 28 Ohio St. 41; *Keith v. Goodwin*, 81 Vt. 268, 73 Am. Dec. 845. See post, § 107.

<sup>78</sup> *State v. McDonald*, 4 Idaho, 468, 40 Pac. 312, 95 Am. St. Rep. 137; *Trustees of Schools v. Shelk*, 119 Ill. 579, 8 N. E. 189, reversing 10 Ill. App. 51; *Tillson v. State*, 29 Kan. 452; *Senour v. Maschiot* (Ky.) 31 S. W. 481; *State v. Peck*, 53 Me. 284; *Clark v. Bank of Hennessey*, 14 Okl. 572, 79 Pac. 217; *Loew's Adm'r v. Stocker*, 68 Pa. (18 P. F. Smith) 226; *Commonwealth v. Lamar*, 32 Pa. Super. Ct. 200; *Rader v. Davis*, 5 Lea (Tenn.) 536; *San Roman v. Watson*, 54 Tex. 254; *Eureka Sandstone Co. v. Long*, 11 Wash. 161, 39 Pac. 446; *Douglas County v. Bardon*, 79 Wis. 641, 48 N. W. 969. In some states the sureties are made liable by statute. *McIntosh v. Hurst*, 6 Mont. 287, 12 Pac. 647; *Johnson v. Johnson*, 31 Ohio St. 131.

<sup>79</sup> *CITY OF DEERING v. MOORE*, 86 Me. 181, 29 Atl. 988, 41 Am. St. Rep. 534. The rule would be otherwise as to a bail bond, where the sureties have peculiar rights flowing from the stipulations agreed to by the principal. *Bean v. Parker*, 17 Mass. 591.

<sup>80</sup> *Trustees of Schools v. Shelk*, 119 Ill. 579, 8 N. E. 189, reversing 16 Ill. App. 49; *Harnsberger v. Yancey*, 33 Grat. (Va.) 527.



jurisdictions, including Massachusetts<sup>81</sup> and Minnesota,<sup>82</sup> a principal is regarded as essential; and a bond which has not been executed by the principal is void.<sup>83</sup>

A guaranty of a lease is valid, though only one of two lessees executed it.<sup>84</sup>

#### FORMALITY OF CONTRACT.

**46. A contract of suretyship may be created by any form of expression which will indicate clearly the intention of the parties.**

No particular form of words is required to constitute a contract of suretyship. In general, no formalities are required by law, except such as are provided by the statute of frauds,

<sup>81</sup> *Goodyear Dental Vulcanite Co. v. Bacon*, 151 Mass. 460, 24 N. E. 404, 8 L. R. A. 486; *RUSSELL v. ANNABLE*, 109 Mass. 72, 12 Am. Rep. 665.

<sup>82</sup> *Martin v. Hornsby*, 55 Minn. 187, 56 N. W. 751, 43 Am. St. Rep. 487; *State v. Austin*, 35 Minn. 51, 26 N. W. 906.

<sup>83</sup> *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758; *Mayo v. Renfro*, 66 Ga. 408; *Wells v. Dill*, 1 Mart. N. S. (La.) 592; *Johnston v. Kimball Tp.*, 39 Mich. 187, 33 Am. Rep. 372; *American Radiator Co. v. American Bonding & Trust Co.* (Neb.) 100 N. W. 138; *Carroll County Sav. Bank v. Strother*, 22 S. C. 552; *Board of Education of Rapid City v. Sweeney*, 1 S. D. 642, 48 N. W. 302, 36 Am. St. Rep. 767; *Fletcher v. Austin*, 11 Vt. 447, 34 Am. Dec. 698. If it could positively be shown that the sureties delivered the bond to be operative against themselves alone, they would be bound. *Wild Cat Branch v. Ball*, 45 Ind. 213; *Hall v. Parker*, 39 Mich. 287. In *RUSSELL v. ANNABLE*, 109 Mass. 72, 12 Am. Rep. 665, the name of a firm was signed to an attachment bond by one partner without authority, and it was held that the bond was void; but in *WEARE v. SAWYER*, 44 N. H. 198, the sureties were held liable where bonds of a school district were executed by agents without authority. It was said that the agents would be bound as principals, and the sureties, knowing all of the facts, were liable, though they supposed that some one else was the principal. See post, § 62.

<sup>84</sup> *McLaughlin v. McGovern*, 34 Barb. (N. Y.) 208. Where a guaranty was made of an instrument supposed by all persons to be a promissory note, but which was payable to the maker's order, and not indorsed by him, the guarantor was held bound. *JONES v. THAYER*, 12 Gray (Mass.) 443, 74 Am. Dec. 602.

which will be considered in a subsequent chapter.<sup>85</sup> If the parties intend to enter into a particular kind of a contract, it is essential that the formalities of a contract of that particular nature be observed. Thus, if the surety intends to become a party to a negotiable instrument, he must conform to the requirements of an instrument of that nature. If he desires to enter into a bond, the instrument signed by him must have the essential characteristics of a bond. These will be noticed later.<sup>86</sup> But, having determined upon the nature of his particular contract, and having observed the formalities necessary for that contract, the character of surety will result without any formality, or the use of the words "surety" or "guaranty." If two parties sign a promissory note as joint makers, and one only receives the consideration, the other becomes a surety without any further contract.<sup>87</sup> If a person intend to become a joint maker of an instrument, he will be held to be such although he signs his name upon the back.<sup>88</sup>

The liability of a surety is not affected by the fact that he became such without the knowledge of the principal.<sup>89</sup>

#### ESSENTIALS OF A BOND.

**47. If it is the intention of the parties to enter into a bond, the instrument executed by them must contain the characteristics of such an obligation.**

##### *Date.*

It is not necessary that a bond should bear a date, as it takes effect from the time of delivery and acceptance.<sup>90</sup>

<sup>85</sup> See post, c. III.

<sup>86</sup> See next section.

<sup>87</sup> Sefton v. Hargett, 113 Ind. 592, 15 N. E. 513.

<sup>88</sup> Schmidt v. Schmaelter, 45 Mo. 502.

<sup>89</sup> Solary v. Stultz, 22 Fla. 263; Hughes v. Littlefield, 18 Me. (6 Shep.) 400. A request of the surety to sign may be presumed from the principal taking advantage of the instrument executed; as by appearing on appeal the principal will be presumed to have requested the surety to sign the appeal bond. Snell v. Warner, 63 Ill. 176.

<sup>90</sup> Fournier v. Cyr, 64 Me. 33.

*Penalty and Condition.*

There must be a penalty<sup>91</sup> and a condition;<sup>92</sup> otherwise there is no covenant, and the instrument is void.

*Signature.*

If the sureties sign and seal a bond, they are bound, although their names are omitted from the body thereof;<sup>93</sup> but the fact that persons are named in the body of the bond as sureties attaches no liability upon them unless they in fact sign and seal it,<sup>94</sup> even though the name of a surety in the body of the bond is written by himself.<sup>95</sup>

*Seal.*

Any mark or sign, however small, intended by the signer as a seal, will be sufficient.<sup>96</sup> Where there are a greater number of signatures than seals, two or more signers may adopt one seal.<sup>97</sup> Seals have been abolished in some states,<sup>98</sup> while in others the distinction between a sealed and an unsealed instrument is not so marked as it was under the common law.<sup>99</sup>

<sup>91</sup> *Evarts v. Steger*, 6 Or. 55; *Austin v. Richardson*, 1 Grat. (Va.) 810.

<sup>92</sup> *Fitzgerald v. Staples*, 88 Ill. 234, 30 Am. Rep. 551.

<sup>93</sup> *Nell v. Morgan*, 28 Ill. 524; *Scheid v. Leibschultz*, 51 Ind. 38; *Valentine v. Christie*, 1 Rob. (La.) 298; *Fournier v. Cyr*, 64 Me. 32; *Danker v. Atwood*, 119 Mass. 146; *Holmes v. State*, 17 Neb. 73, 22 N. W. 232; *Ex parte Fulton*, 7 Cow. (N. Y.) 484; *Joyner v. Cooper*, 2 Bailey (S. C.) 199; *Campbell v. Campbell*, *Brayton* (Vt.) 38. A surety on a lease will be liable, although his name does not appear therein. *Perkins v. Goodman*, 21 Barb. (N. Y.) 218.

<sup>94</sup> *Pevito v. Rodgers*, 52 Tex. 581.

<sup>95</sup> *Wild Cat Branch v. Ball*, 45 Ind. 213.

<sup>96</sup> A dash may be a sufficient seal. *Hacker's Appeal*, 121 Pa. 192, 15 Atl. 500, 1 L. R. A. 861. The abbreviation "L. S.," for "locus sigilli," originally intended to indicate the place for affixing the seal, is used now as the seal itself. *Smith v. Butler*, 25 N. H. 524. See an interesting note in regard to seals on page 232, *Stearns, Law of Suretyship*.

<sup>97</sup> *New Orleans, St. L. & O. Ry. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Northumberland v. Cobleigh*, 59 N. H. 250; *Building Ass'n v. Cummings*, 45 Ohio St. 664, 16 N. E. 841.

<sup>98</sup> Private seals have been abolished in Indiana, Iowa, Kansas, Mississippi, Montana, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas.

<sup>99</sup> Changes have been made in California, Kentucky, Michigan, New Jersey, New York, Oregon, and Wisconsin. In Illinois suit may be

Where a seal is required by statute on the bond of a public officer, its omission renders the instrument a nullity as a specialty; but, if the officer fills the position, the sureties will be liable upon the instrument as a simple contract.<sup>100</sup>

#### QUALIFICATION OF LIABILITY.

**48. A surety can qualify his signature by the addition of words to describe his character; and he can limit the amount for which he shall be held liable.**

A person signing an instrument is at liberty to qualify his signature by the addition of the word "surety," or other technical words to indicate his intention and describe his true relationship to the transaction, and all persons are bound to take notice of the character in which he has signed.<sup>101</sup>

While the general rule is that a surety is liable for the entire amount called for in the instrument,<sup>102</sup> it is not necessary that the obligation of the principal and surety should be co-extensive.<sup>103</sup> The surety is at liberty to limit such liability to a specific sum set opposite to his name, in which case he cannot be held for any greater amount.<sup>104</sup> So, a guaranty of a promissory note may provide for a lower rate of interest than is called for in the note itself, and the guarantor cannot be held liable to an amount larger than the principal of the note and interest at the rate he has designated.<sup>105</sup> Likewise,

brought upon a sealed instrument as if a simple contract. *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467.

<sup>100</sup> *United States v. Linn*, 15 Pet. (U. S.) 290, 10 L. Ed. 742. It is not a defense for the sureties that the bond is not stamped. *McGovern v. Hoesback*, 53 Pa. 176.

<sup>101</sup> See post, § 103.

<sup>102</sup> *Richardson v. Allen*, 74 Ga. 719; *Hooper v. Hooper*, 81 Md. 155, 31 Atl. 508, 48 Am. St. Rep. 496.

<sup>103</sup> *Gasquet v. Dmitry*, 9 La. 585.

<sup>104</sup> *Westbrook v. Moore*, 59 Ga. 204; *People v. Slocum*, 1 Idaho, 62; *Houck v. Graham*, 123 Ind. 277, 24 N. E. 113; *City of New Orleans v. Waggaman*, 81 La. Ann. 299; *City of Butte v. Cohen*, 9 Mont. 435, 24 Pac. 206.

<sup>105</sup> *Cozzens v. Brick Co.*, 166 Ill. 213, 46 N. E. 788. The words "out of assets placed in my hands" will not restrict the liability of

a guarantor of bonds, which are due at a certain time, can guaranty them to be paid at a later time, in which case the guarantor cannot be held until that time, although the principal may be liable before.<sup>106</sup>

#### CONSIDERATION—NECESSITY.

49. A contract of suretyship, not under seal, which is not based upon a consideration, is void.

**EXCEPTION**—A negotiable instrument, made without consideration, is valid in the hands of a purchaser for value without notice.

#### SAME—ADEQUACY.

50. The consideration need not be adequate.

#### SAME—LEGALITY.

51. The consideration must be legal.

A sufficient consideration is essential to the validity of every simple contract,<sup>107</sup> and such consideration will not be pre-

a guarantor of the payment of a promissory note. *Wadsworth v. Smith*, 43 Iowa, 439.

<sup>106</sup> *Union Trust Co. v. Motor Co.*, 117 Mich. 631, 78 N. W. 112. A guaranty of payment of water rent after a named date is binding, although the lessee is liable prior to that time. *Moss v. Blyth* (Sup.) 92 N. Y. Supp. 294.

<sup>107</sup> *Lagomarsino v. Giannini*, 146 Cal. 545, 80 Pac. 698; *Cowles v. Peck*, 55 Conn. 251, 10 Atl. 569, 3 Am. St. Rep. 44; *Harwood v. Klersted*, 20 Ill. 367; *Post v. Losey*, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; *Briggs v. Latham*, 36 Kan. 205, 13 Pac. 129; *Aldridge v. Turner*, 1 Gill & J. (Md.) 427; *Tenney v. Prince*, 4 Pick. (Mass.) 385, 16 Am. Dec. 347; *Macfarland v. Helm*, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629; *March v. Putney*, 56 N. H. 34; *BELKNAP v. BENDER*, 75 N. Y. 446, 31 Am. Rep. 476; *PUTNAM v. SCHUYLER*, 4 Hun (N. Y.) 166; *McMillan v. Burkham*, 1 Wkly. Law Bul. (Ohio) 111; *Cobb v. Page*, 17 Pa. 469; *Gilman v. Kibler*, 24 Tenn. (5 Humph.) 19; *Buttler v. Davis*, 52 Tex. 74; *Beers v. Spooner*, 9 Leigh (Va.) 153. If the original contract was void for want of consideration, a renewal of it is void likewise. *Hetherington v. Hixon*, 46 Ala. 297.

sumed.<sup>108</sup> At common law a person executing a sealed instrument is estopped to deny the absence of a consideration.<sup>109</sup>

*Definition of Consideration.*

Consideration is some right, interest, profit, or benefit accruing to the promisor, or some forbearance given, detriment or loss suffered, or responsibility undertaken by the promisee at the express or implied request of the promisor. It will be noticed, from this definition, that consideration may be either one or the other of two forms—either some advantage received by the party who promises, or some disadvantage to the party to whom the promise is given.<sup>110</sup> Usually, in contracts

<sup>108</sup> *Richner v. Kreuter*, 100 Ill. App. 548; *EVANSVILLE NAT. BANK v. KAUFMANN*, 93 N. Y. 273, 45 Am. Rep. 204. If a guaranty be made after delivery of the instrument, the burden is on the plaintiff to show the consideration. *Featherstone v. Hendrick*, 59 Ill. App. 497. The words "for value received" import a consideration, and the defendant must show the contrary. *Quimby v. Morrill*, 47 Me. 470; *Austin, Tomlinson & Webster Mfg. Co. v. Heiser*, 6 S. D. 429, 61 N. W. 445. But, if it is not stated from whom the value is received, it is insufficient to show a consideration. *DAVIS SEWING MACH. CO. v. RICHARDS*, 115 U. S. 524, 6 Sup. Ct. 173, 29 L. Ed. 480. If the writing name a consideration it is not conclusive, and the truth may be inquired into. *Swope v. Forney*, 17 Ind. 385.

<sup>109</sup> *Van Valkenburgh v. Smith*, 60 Me. 97; *Roth v. Adams*, 185 Mass. 341, 70 N. E. 445; *Jerome v. Ortman*, 66 Mich. 668, 33 N. W. 759; *Hale v. Dessen*, 73 Minn. 277, 76 N. W. 31; *Montgomery County v. Auchley*, 103 Mo. 492, 15 S. W. 626; *Aller v. Aller*, 40 N. J. Law, 446; *Smith v. Northrup*, 80 Hun, 65, 29 N. Y. Supp. 851, affirmed 145 N. Y. 627, 40 N. E. 165; *Cosgrove v. Cummings*, 195 Pa. 497, 46 Atl. 69; *Harris v. Harris' Ex'r*, 23 Grat. (Va.) 737; *Storm v. United States*, 94 U. S. 76, 24 L. Ed. 42. Where a bond recites a consideration, it cannot be contradicted by oral evidence. *Cocks v. Barker*, 49 N. Y. 107; *Miller v. Bagwell*, 3 McCord (S. C.) 562. A recognizance is an obligation of record, and requires no consideration. *Mitchell v. Thorp*, 5 Wend. (N. Y.) 287; *Johnson v. Laserre*, 2 Ld. Raym. 287. By statute, want or failure of consideration may be shown in California, Indiana, Iowa, Kansas, Kentucky, Michigan, Nebraska, New Jersey, New York, Oregon, Wisconsin, and, possibly, in other states, although the instrument is under seal. See *Haven v. Chicago Co.*, 96 Ill. App. 92.

<sup>110</sup> *Darby v. Berney Nat. Bank*, 97 Ala. 643, 11 South. 881; *Robinson v. Hyer*, 35 Fla. 544, 17 South. 745; *Hirsch v. Carpet Co.*, 82 Ill. App. 234; *Hunt v. Daniel*, 29 Ky. (6 J. J. Marsh.) 308; *Blackford v. Gibbs*, 8 Cush. (Mass.) 156; *Adams v. Huggins*, 78 Mo. App. 219;

of suretyship, the consideration is of the latter kind. A surety, for illustration, who reluctantly signs a promissory note for the accommodation of his friend, may be compelled to pay it, although he has never received one cent of the money for which the note was given, and, if the principal be insolvent, the surety may have no practical means of recovering the amount paid. The consideration for the contract of suretyship is clearly no benefit received by the surety; but the payee of the note would not have parted with his money to the principal had he not been given the promise of the surety, and the consideration is that the creditor has suffered the disadvantage of having parted with his money.<sup>111</sup> Although, as above stated, a consideration is not necessary in a sealed instrument, and a surety who has become a party to a deed will not be al-

Conover v. Stillwell, 34 N. J. Law, 54; UNION BANK OF LOUISIANA v. COSTER'S EX'RS, 3 N. Y. 203, 53 Am. Dec. 280; Pennsylvania Coal Co. v. Blake, 85 N. Y. 226; BALLARD v. BURTON, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664; Colgin v. Henley, 6 Leigh (Va.) 85. This rule is sometimes worded that the consideration moving to the principal is sufficient to support the contract of the surety. Kennedy & Shaw Lumber Co. v. S. S. Co., 123 Cal. 584, 56 Pac. 457; Gay v. Mott, 43 Ga. 252; Hippach v. Makeever, 166 Ill. 136, 46 N. E. 790; Favorite v. Stidham, 84 Ind. 423; Winans v. Gibbs, 48 Kan. 777, 30 Pac. 163; Union Bank of Louisiana v. Beatty, 10 La. Ann. 378; True v. Harding, 12 Me. (3 Fairf.) 193; Heyman v. Dooley, 77 Md. 162, 26 Atl. 117, 20 L. R. A. 257; Lennox v. Murphy, 171 Mass. 370, 50 N. E. 644; D. M. Osborne & Co. v. Gullikson, 64 Minn. 218, 66 N. W. 965; Wren v. Pearce, 4 Smedes & M. (Miss.) 91; Robertson v. Findley, 31 Mo. 384; Savage v. Fox, 60 N. H. 17; McNaught v. McClaughry, 42 N. Y. 22, 1 Am. Rep. 487; Erie Co. Sav. Bank v. Colt, 104 N. Y. 532, 11 N. E. 54; Greer v. Jones, 52 N. C. (7 Jones. Law) 581; Paul v. Stackhouse, 38 Pa. 302; Henderson v. Rice, 41 Tenn. (1 Cold.) 223; Gagen v. Stevens, 4 Utah, 348, 9 Pac. 706; Bebee v. Moore, 3 McLean, 387, Fed. Cas. No. 1,202.

<sup>111</sup> Parkhurst v. Vail, 73 Ill. 343; Clopton v. Hall, 51 Miss. 482; McNaught v. McClaughry, 42 N. Y. 22, 1 Am. Rep. 487; Green v. Thornton, 49 N. C. 230; UNDERWOOD v. STANEY, 1 Cases in Chan. 77. The same rule applies in the case of a guaranty given at the time a note is transferred. Worden v. Salter, 90 Ill. 160; Gillighan v. Boardman, 29 Me. (16 Shep.) 79. Or a guaranty of the payment of goods sold. GIBBS v. BLANCHARD, 15 Mich. 292; Lamb v. Briggs, 22 Neb. 138, 34 N. W. 217; Beakes v. Da Cunha, 126 N. Y. 298, 27 N. E. 251, affirming 58 Hun, 609, 12 N. Y. Supp. 851; Young v. Brown, 53 Wis. 333, 10 N. W. 394.

lowed to set up lack of consideration, yet in many cases of bonds given for the faithful performance of services of officers a consideration could be found in the fact that the principal would not be allowed to enter upon his duties until he had given the bond; that is, the employer has suffered the disadvantage of having placed his money or his affairs in the hands of an employé who has the opportunity of injuring his employer by some wrongful act.<sup>112</sup> The consideration might be both some advantage to the surety or some detriment to the creditor; but, in such case, the former is spoken of usually as being the consideration.

*Past Consideration.*

What is known as a "past consideration" is no consideration at all.<sup>113</sup> A past consideration is some act or forbearance fully performed, by which a person has been benefited without any legal liability upon his part.<sup>114</sup> Suppose a promissory note to have been executed and delivered to the payee, and the maker of the note has received from the payee the sum called for in the note. Afterwards, without any prior agreement between them, the payee requests the signature of a surety to the note, and the maker procures such signature. The surety would not be liable to the payee, or to anyone having notice, as there was no consideration for his promise.<sup>115</sup> He cannot

<sup>112</sup> See *Thompson v. Blanchard*, 3 N. Y. 335.

<sup>113</sup> *Ware v. Adams*, 24 Me. (11 Shep.) 177; *Eldar v. Warfield*, 7 Har. & J. (Md.) 391; *Yale v. Edgerton*, 14 Minn. 194 (Gil. 144); *Farnsworth v. Clark*, 44 Barb. (N. Y.) 601; *Rix v. Adams*, 9 Vt. 233, 31 Am. Dec. 619.

<sup>114</sup> *Clark*, *Contracts* (2d Ed.) p. 187.

<sup>115</sup> *Anderson v. Bellenger*, 87 Ala. 334, 6 South. 82, 4 L. R. A. 680, 13 Am. St. Rep. 46; *Hazeltine v. Larco*, 7 Cal. 32; *Cowles v. Pick*, 55 Conn. 251, 10 Atl. 569, 3 Am. St. Rep. 44; *Parkhurst v. Vall*, 73 Ill. 343; *Anderson v. Norvill*, 10 Ill. App. (10 Bradw.) 240; *Favorite v. Stidham*, 84 Ind. 423; *Briggs v. Downing*, 48 Iowa, 550; *Greer v. Clermont Distilling Co.*, 15 Ky. Law Rep. 237; *Sawyer v. Fernald*, 59 Me. 500; *Roberts v. Woven Wire Mattress Co.*, 46 Md. 374; *Tenney v. Prince*, 21 Mass. (4 Pick.) 385, 16 Am. Dec. 347; *Green v. Shepherd*, 87 Mass. (5 Allen) 589; *Clopton v. Hall*, 51 Miss. 482; *Peck v. Harris*, 57 Mo. App. 467; *Barnes v. Van Keuren*, 31 Neb. 165, 47 N. W. 848; *McNaught v. McClaughry*, 42 N. Y. 22, 1 Am. Rep. 487; *Greer v. Jones*, 52 N. C. (7 Jones, Law) 581; *Gilman v. Kibler*, 24 Tenn. (5 Humph.) 19; *Jones v. Ritter*, 32 Tex. 717; *Good v. Martin*,



be said to have received any benefit. The principal has received that. Nor has the payee suffered any disadvantage, for he already had parted with his money, relying upon the promise of the principal alone. He has not incurred any additional disadvantage when the surety signed. Rather, the surety is the one who suffers the disadvantage, as he has promised to pay a sum of money which he never received. The transaction was complete before the surety signed, and comes under the designation of past consideration; the parting with the money by the payee having occurred before there was any thought of a surety. If, during the original negotiations between the principal and the creditor, before the contract was complete, the creditor had stipulated that the maker should procure a surety when asked to do so, there would have been a consideration for the contract of the surety whenever he might sign,<sup>116</sup> as, in such case, the creditor suffered the disadvantage of parting with his money in reliance upon the surety to be obtained, and would not have parted with his money had it not been for the contract of suretyship yet to be made.

Another instance of past consideration which is not uncommon is a contract of suretyship entered into on account of for-

95 U. S. 90, 24 L. Ed. 341. An injunction bond, given after the injunction has issued, is without consideration. *Carter v. Mulrein*, 82 Cal. 167, 22 Pac. 1086, 16 Am. St. Rep. 99. A guaranty of payment of goods already delivered would be without consideration, although a guaranty of payment of goods to be delivered, contained in the same instrument, would be valid. *WOOD v. BENSON*, 2 Crompt. & Jervis, 94.

<sup>116</sup> *Williams v. Perkins*, 21 Ark. 18; *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279; *Grim v. Semple*, 39 Iowa, 570; *Gillighan v. Boardman*, 29 Me. 79; *Moles v. Bird*, 11 Mass. 436, 6 Am. Dec. 179; *Bowen v. Thwing*, 56 Minn. 177, 57 N. W. 468; *McNaught v. McClaughry*, 42 N. Y. 22, 1 Am. Rep. 487; *Harrington v. Brown*, 77 N. Y. 72; *Paul v. Stackhouse*, 38 Pa. 302. An agreement, prior to purchasing goods, that the buyer will procure a guarantor for the price, makes a guaranty binding, though the latter is given after the delivery of the goods. *Windels v. Milwaukee Harvester Co.*, 39 Ill. App. 521; *Standley v. Miles*, 36 Miss. 434; *Helios-Upton Co. v. Thomas*, 96 App. Div. 401, 89 N. Y. Supp. 222. An agreement to give a bond to secure the performance of a building contract, if made before the work is begun, renders the bond enforceable, though not delivered until afterwards. *SMITH v. MOLLESON*, 148 N. Y. 241, 42 N. E. 669.

bearance given by the creditor to the principal without previous agreement. If, when a debt is due, the debtor should request time for payment, and the creditor agrees to grant an extension if the principal will obtain the signature of a surety, this is a sufficient consideration to support the promise of the surety. The creditor, in such case, suffers a disadvantage. He had the right to proceed immediately against the principal, but has postponed that right, and, in the meantime, the financial condition of the principal may change, so that all practical remedy against the principal is lost. In such case the surety is liable. But if, from the kindness of his heart, the creditor, without any agreement with the debtor, knowing that the latter's financial circumstances were such as to make it a hardship for him to make payment at the time the debt was due, should not request payment for some time after, and the principal, in gratitude for the forbearance of his creditor, should procure a surety for the debt, without any agreement as to further forbearance, the surety would not be bound, as the forbearance was a past act, and the creditor does not incur any disadvantage additional to that which he has already incurred.<sup>117</sup>

*Past and Future Acts.*

The contract of a surety to pay for services already rendered without any agreement will be supported by a consideration, and therefore enforceable, if the contract includes payment for services to be rendered, as well as those rendered prior to the agreement.<sup>118</sup> Such would be the case where a surety promises a physician to become responsible for services rendered for another in the past, if he would continue his professional attendance. The rendition of subsequent services by the physician, in reliance upon the surety's promise, is a consideration for the promise of the surety as to all of the services.<sup>119</sup>

<sup>117</sup> *Webbe v. Romona Oilfield Stone Co.*, 58 Ill. App. 222; *Mecorney v. Stanley*, 62 Mass. (8 Cush.) 85; *Hess' Estate*, 150 Pa. 346, 24 Atl. 676; *United States v. Linn*, 15 Pet. 290, 10 L. Ed. 742.

<sup>118</sup> It makes no difference that the greater part of the amount guarantied is past indebtedness, if a portion is future. *Clune v. Ford*, 55 Hun, 479, 8 N. Y. Supp. 719.

<sup>119</sup> *Bagley v. Moulton*, 42 Vt. 184.

Likewise, advancing money to the principal under an agreement with a person that the latter will guaranty the payment of advances already made as well as those to be made, is a consideration for such guaranty.<sup>120</sup>

*Presumption as to the Time of Making Contract.*

Where the contract of suretyship appears upon the same paper with the principal contract, the prima facie presumption is that they were made at the same time, and therefore that there is a consideration for the contract of suretyship if there is one for the principal contract.<sup>121</sup>

*Consideration Not Waived by a Writing.*

Sometimes an impression obtains that, if a contract of suretyship is evidenced in writing, it is unnecessary that there be any consideration. Possibly this impression arises from the fact that it is held, sometimes, that the writing need not disclose the consideration.<sup>122</sup> However, a writing, unless under seal,<sup>123</sup> will not dispense with a consideration in any instance.<sup>124</sup>

*Negotiable Instruments.*

A consideration is presumed in the case of negotiable instruments, and this presumption is conclusive when the instru-

<sup>120</sup> *Hargroves v. Cooke*, 15 Ga. 321; *Cowan v. Roberts*, 134 N. C. 415, 46 S. E. 979, 65 L. R. A. 729, 101 Am. St. Rep. 845; *Peters v. Merchants' Bank*, 149 Fed. 373, 79 C. C. A. 193. But an agreement by the creditor to keep on working for the guarantor for full compensation is no consideration for a guaranty of past wages due from others. *BELKNAP v. BENDER*, 75 N. Y. 440, 31 Am. Rep. 476.

<sup>121</sup> *Underwood v. Hossack*, 38 Ill. 208; *Arnold v. Bryant*, 71 Ky. (8 Bush) 668; *Gilman v. Lewis*, 15 Me. (3 Shep.) 452; *Bickford v. Gibbs*, 8 Cush. (Mass.) 154; *Higgins v. Watson*, 1 Mich. (Man.) 428; *Draper v. Snow*, 20 N. Y. 331, 75 Am. Dec. 408; *Sneilly v. Johnston*, 1 Watts & S. (Pa.) 307.

<sup>122</sup> See post, § 74.

<sup>123</sup> See ante, note 109.

<sup>124</sup> The statute did not dispense with anything which was essential to the validity of a contract at the time the statute was enacted, but added the requirement of written evidence. *Aldridge v. Turner*, 1 Gill & J. (Md.) 427; *Tenney v. Prince*, 4 Pick. (Mass.) 385, 16 Am. Dec. 347; *Clark v. Small*, 6 Yerg. (Tenn.) 418.

ment comes into the hands of a purchaser for value without notice.<sup>125</sup>

*Adequacy of Consideration.*

The law does not require adequacy of consideration.<sup>126</sup> Any benefit received, however small, will support the promise, if made without fraud.<sup>127</sup> So long as the consideration has some value in the eyes of the law, the courts will not inquire of what value it may be to the parties themselves; otherwise the law, instead of the parties, would be making the bargain. A consideration of one dollar is sufficient to support a contract of suretyship for any amount.<sup>128</sup> The surety assumes the risk, and it is competent for him to fix the price as he chooses.<sup>129</sup> So, any detriment, however small, suffered by the promisee, is sufficient.<sup>130</sup>

*Forbearance.*

Forbearance to be given by the creditor to sue the principal for an overdue debt is a sufficient consideration for the promise of a surety to pay the debt.<sup>131</sup> But the time must be

<sup>125</sup> *Stone v. Bond*, 2 Heisk. (Tenn.) 425. See Norton, Bills & Notes (3d Ed.) p. 276.

<sup>126</sup> *Taylor, Thomas & Co. v. Wightman*, 51 Iowa, 411, 1 N. W. 607; *DAVIS v. WELLS*, 104 U. S. 164, 26 L. Ed. 686. See Clark, Contracts (2d Ed.) p. 112.

<sup>127</sup> *Williams v. Marshall*, 42 Barb. (N. Y.) 524; *DAVIS v. WELLS*, 104 U. S. 164, 26 L. Ed. 686.

<sup>128</sup> *Jackson's Adm'r v. Jackson*, 7 Ala. 791; *DAVIS v. WELLS*, 104 U. S. 159, 26 L. Ed. 686. Where a consideration is named, it does not prevent the real consideration being shown by oral evidence. *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279; *Taylor, Thomas & Co. v. Wightman*, 51 Iowa, 411, 1 N. W. 607.

<sup>129</sup> *Oakley v. Boorman*, 21 Wend. (N. Y.) 588.

<sup>130</sup> *BALLARD v. BURTON*, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664.

<sup>131</sup> *Ives v. McHard*, 103 Ill. 97; *Wylie v. Dickenson*, 50 Ill. App. 622; *Fuller v. Scott*, 8 Kan. 27; *King v. Upton*, 4 Me. (4 Greenl.) 387, 16 Am. Dec. 286; *Johnson v. Wilmarth*, 54 Mass. (18 Metc.) 416; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593; *Peterson v. Russell*, 62 Minn. 220, 64 N. W. 555, 29 L. R. A. 612, 54 Am. St. Rep. 634; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119, 41 Am. Dec. 685; *Pennsylvania Coal Co. v. Blake*, 85 N. Y. 226; *McFarland v. Smith*, 6 Cow. (N. Y.) 669; *Kean v. McKinsey*, 2 Pa. (2 Barr) 80; *Allen v. Morgan*, 24 Tenn. (5 Humph.) 624; *Dahlman v. Hammel*, 45 Wis. 466.

definite; otherwise, the creditor may sue at any time, and would suffer no disadvantage, in which case there would be no consideration.

The time is considered definite, if given for a considerable time,<sup>132</sup> a reasonable time,<sup>133</sup> or a convenient time,<sup>134</sup> as these imply some length of time, and some detriment suffered by the creditor. An agreement to forbear for an indefinite time, and actual forbearance for a reasonable time, is sufficient.<sup>135</sup> Taking new security payable at a future date, which imposes a duty upon the creditor of waiting until the maturity of such new security, would be forbearance.<sup>136</sup> Actual forbearance may be some evidence to prove an agreement to forbear.<sup>137</sup>

As stated above, it is necessary that the forbearance be given, in part at least, on account of the promise of the surety.<sup>138</sup> A promise to forbear the prosecution of a claim which has no foundation is without consideration.<sup>139</sup>

The withdrawal of a suit brought against the principal is a sufficient consideration for the promise of a surety to pay the debt which is the subject of the suit; such withdrawal having been made as the result of the agreement with the surety.<sup>140</sup>

<sup>132</sup> *Maples v. Sidney*, Cro. Jac. 683.

<sup>133</sup> *Lonsdale v. Brown*, 4 Wash. C. C. 148, Fed. Cas. No. 8,494.

<sup>134</sup> *Tricket v. Mandlee*, Sid. 45.

<sup>135</sup> *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279; *Rowlet v. Eubank*, 1 Bush (Ky.) 477; *Elting v. Vanderlyn*, 4 Johns. (N. Y.) 237; *Thomas v. Croft*, 2 Rich. Law (S. C.) 113, 44 Am. Dec. 279; *BALLARD v. BURTON*, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664.

<sup>136</sup> *Andrews v. Marrett*, 58 Me. 539; *Eisner v. Keller*, 3 Daly (N. Y.) 485.

<sup>137</sup> *Steadman v. Guthrie*, 4 Metc. (Ky.) 147; *Douglass v. Reynolds*, 7 Pet. (U. S.) 113, 8 L. Ed. 626.

<sup>138</sup> *Savage v. Bank*, 112 Ala. 508, 20 South. 398; *Breed v. Hillhouse*, 7 Conn. 523; *Harwood v. Kiersted*, 20 Ill. 367; *Walker v. Sherman*, 11 Metc. (Mass.) 170; *Shupe v. Galbraith*, 32 Pa. 10.

<sup>139</sup> *Cabot v. Haskins*, 20 Mass. (3 Pick.) 83.

<sup>140</sup> *Castner v. Slater*, 50 Me. 212; *Worcester Mechanics' Sav. Bank v. Hill*, 113 Mass. 25. The release of an attachment is sufficient consideration. *Smith v. Weed*, 20 Wend. (N. Y.) 184, 32 Am. Dec. 525. Or that the creditor will make no additional costs or expenses. *Wiggenhorn v. Fitzgerald*, 5 Neb. (Unof.) 457, 98 N. W. 1079.

*Extension of Time.*

An agreement on the part of the creditor to extend the time of payment by the principal for a definite time is a sufficient consideration for a promise by a surety to pay the debt; such extension having been given as the result of the surety's promise.<sup>141</sup>

*Release.*

The surrender of a promissory note signed by the principal alone is a sufficient consideration for a new one executed by the principal and a surety.<sup>142</sup> So, the relinquishment, by agreement, of a lien which secures a debt, is a consideration for the promise of a surety to pay the debt.<sup>143</sup>

So if, by agreement, a seller relinquishes his right to rescind the sale on account of the fraud of the buyer, and to reclaim the goods, it is a consideration of a promise of a surety to pay the price.<sup>144</sup>

Commissions allowed to an agent for the sale of property are a sufficient consideration for his guaranty of notes taken

<sup>141</sup> *First Nat. Bank of Monmouth v. Whitman*, 66 Ill. 331; *McHard v. Ives*, 5 Ill. App. (5 Bradw.) 400; *Coffin v. Trustees*, 92 Ind. 337; *Fuller v. Scott*, 8 Kan. 27; *Pullam v. Withers*, 38 Ky. (8 Dana) 98, 33 Am. Dec. 479; *Pratt v. Hedden*, 121 Mass. 113; *Stone v. White*, 74 Mass. (8 Gray) 589; *Lee v. Wisner*, 38 Mich. 82; *Peterson v. Russell*, 62 Minn. 220, 64 N. W. 555, 29 L. R. A. 612, 54 Am. St. Rep. 634; *Faulkner v. Gilbert*, 57 Neb. 544, 77 N. W. 1072; *Kean v. McKinsey*, 2 Pa. (2 Barr) 30; *Lonas v. Wolfe*, 67 Tenn. (8 Baxt.) 179; *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917; *Dahlman v. Hammel*, 45 Wis. 466. A pre-existing debt is a sufficient consideration for a guaranty of a third person's note delivered in payment thereof. *Munson v. Adams*, 89 Ill. 450.

<sup>142</sup> *Coffin v. Trustees of Asbury Univ.*, 92 Ind. 337; *Miller v. Gardner*, 49 Iowa, 234; *Aultman & Taylor Co. v. Gorham*, 87 Mich. 233, 49 N. W. 486; *Queens County Bank v. Leavitt*, 56 Hun, 647, 10 N. Y. Supp. 194; *BALLARD v. BURTON*, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 604.

<sup>143</sup> *Killian v. Ashley*, 24 Ark. 511, 91 Am. Dec. 519; *Bluthenthal v. Moore*, 106 Ga. 424, 32 S. E. 344. Where the seller of goods delivered to a vessel refused to allow it to depart until the price of the goods was guaranteed, there is a sufficient consideration for the guaranty. *Washington Iron Works v. McNaught*, 85 Wash. 10, 76 Pac. 301.

<sup>144</sup> *Harwood v. Kiersted*, 20 Ill. 367; *Jaffray v. Brown*, 74 N. Y. 393.

by him in payment.<sup>145</sup> So, leaving a claim in the hands of an attorney for him to control and collect is a sufficient consideration for a contemporaneous guaranty of the claim by him.<sup>146</sup> The assent of an insurance company to the assignment of a policy is a sufficient consideration for a guaranty of payment of the premium by the assignee, such assent having been given on that condition.<sup>147</sup> The institution of a suit may be the consideration of an obligation by the sureties to become responsible for the costs.<sup>148</sup>

*Moral Obligation Insufficient.*

A moral obligation will not support a contract of suretyship.<sup>149</sup> Where a married woman became surety for another, but her contract was void on account of her being married, a renewal of her promise after the passage of a statute authorizing such contracts could not be enforced. Her original promise having been void, there was no consideration for her subsequent promise, however great the moral obligation on her part might be.<sup>150</sup>

There is no consideration for bonds which are improperly given. A bond given to a sheriff to induce him to perform a duty enjoined upon him by law is void. So is an appeal bond given by an administrator, where the administrator is exempt from giving such a bond by reason of having already given a bond as administrator.<sup>151</sup> An appeal bond is without consideration, where the judgment appealed from is a nullity.<sup>152</sup>

A bond may be without consideration as to part only, as where an appeal bond might be void for want of consideration as to the judgment, but valid as to the costs.<sup>153</sup>

<sup>145</sup> *Newton Wagon Co. v. Diers*, 10 Neb. 284, 4 N. W. 995. See, also, *Alter v. Hornor*, 33 La. Ann. 243.

<sup>146</sup> *Gregory v. Gleed*, 33 Vt. 405.

<sup>147</sup> *New England Marine Ins. Co. v. De Wolf*, 25 Mass. (8 Pick.) 56.

<sup>148</sup> *McDonald v. Wood*, 118 Ala. 589, 24 South. 86.

<sup>149</sup> *Martin's Estate*, 131 Pa. 638, 18 Atl. 987.

<sup>150</sup> *Holloway's Assignee v. Rudy*, 60 S. W. 650, 22 Ky. Law Rep. 1406, 53 L. R. A. 353. Where a person is induced to buy corporate stock, which is afterwards guarantied by the seller, there is no consideration for the guaranty. *Martin's Estate*, 5 Pa. Co. Ct. R. 555.

<sup>151</sup> *Buttler v. Davis*, 52 Tex. 74.

<sup>152</sup> *Hessey v. Heltkamp*, 9 Mo. App. 36.

<sup>153</sup> *Byrne v. Riddell*, 4 La. Ann. 8; *Post v. Doremus*, 60 N. Y. 371.

*Illegal Consideration.*

An illegal consideration is no consideration at all.<sup>154</sup> A note signed by a surety upon the promise that the principal would not be prosecuted for embezzlement is void.<sup>155</sup> So would a note, signed by a surety, which was given for a gambling debt.<sup>156</sup> Likewise, a note given to a public officer for a loan of the public funds for private use would be contrary to public policy, and therefore illegal, and a surety thereon would not be liable.<sup>157</sup>

**COMPETENCY OF PARTIES.**

**52. A surety must have legal capacity to make a contract. Incapacity may arise from—**

- (a) **Infancy.**
- (b) **Insanity.**
- (c) **Drunkenness.**
- (d) **Coverture.**
- (e) **Ultra vires acts of corporations.**

**STATUTORY INCAPACITY.**

**53. Although certain classes of persons are forbidden by statute to enter into particular contracts of suretyship, they are bound nevertheless if they do enter into them.**

<sup>154</sup> *Daniels v. Barney*, 22 Ind. 207; *Levy v. Wise*, 15 La. Ann. 38; *Tandy v. Elmore-Cooper Co.*, 113 Mo. App. 409, 87 S. W. 614. But if the money be delivered to the surety to be paid to the creditor, and the surety agrees to pay, he will be liable. *Barker v. Parker*, 23 Ark. 390.

<sup>155</sup> *United States Fidelity & Guaranty Co. v. Charles*, 131 Ala. 658, 31 South. 558, 57 L. R. A. 212; *Rouse v. Mohr*, 29 Ill. App. 321; *Gorham v. Keyes*, 137 Mass. 583; *Board of Education of Hartford Tp. v. Thompson*, 33 Ohio St. 321.

<sup>156</sup> *Leckie v. Scott*, 10 La. 412. A surety on a note may defend by showing that it was given to pay an election bet. *Harley v. Stapleton's Adm'r*, 24 Mo. 248.

<sup>157</sup> *Board of Education of Hartford Tp. v. Thompson*, 33 Ohio St. 321.



The rules as to the competency of the parties to a contract of suretyship are the same as in other kinds of contracts;<sup>158</sup> and they will be treated very briefly here, except so far as they are peculiar to this relation. Sureties must have the same capacity required in the making of any contract.

The insolvency of the surety at the time he entered into the contract is not, in itself, incapacity.<sup>159</sup>

#### *Infancy.*

An infant's liability as surety does not differ from that on his other business contracts. His contracts are voidable at his option,<sup>160</sup> and may be disaffirmed by him at any time previous to his majority, or within a reasonable time thereafter. After majority, he may ratify his contract, if he has full knowledge that he was not bound, and his contract will become binding upon him then.<sup>161</sup>

#### *Insanity and Drunkenness.*

A contract of suretyship made by an insane person is not binding upon him,<sup>162</sup> although the creditor had no knowledge of the surety's unsoundness of mind;<sup>163</sup> nor are the contracts of an intoxicated person binding upon him.<sup>164</sup>

#### *Married Women.*

At common law a married woman lacked capacity to enter into most contracts, though in equity she was allowed to enter into contracts in respect to her separate estate.<sup>165</sup> This disability has been more or less removed by statute in most, if not in all, states. In some states she has the same power to enter into contracts as if she were unmarried, in which case

<sup>158</sup> See Clark, Contracts (2d Ed.) c. VI.

<sup>159</sup> Allen v. Morgan, 5 Humph. (Tenn.) 624.

<sup>160</sup> See Clark, Contracts (2d Ed.) p. 149. As to the liability of a surety where the principal is an infant, see post, § 130.

<sup>161</sup> Fetrow v. Wiseman, 40 Ind. 148; Owen v. Long, 112 Mass. 403; Hinely v. Margaritz, 3 Pa. 428.

<sup>162</sup> Burnham v. Kidwell, 113 Ill. 425; Somers v. Pumphrey, 24 Ind. 231; Ingraham v. Baldwin, 9 N. Y. 45.

<sup>163</sup> Van Patton v. Beals, 46 Iowa, 62.

<sup>164</sup> Clark, Contracts (2d Ed.) p. 186.

<sup>165</sup> Savings Bank v. Scott, 10 Neb. 83, 4 N. W. 314; Cartan v. David, 18 Nev. 310, 4 Pac. 61.

she may become a surety for any purpose.<sup>166</sup> In other states, while her right to enter into contracts generally is extended to her, the power to become surety is expressly denied; the intention being, in such states, to remove her disabilities for her interest, and not to enable her to enter into contracts from which no benefit could be derived.<sup>167</sup> In another class of states, the right to become a surety is given, except in certain particular cases,<sup>168</sup> as she may not become a surety for her husband, the idea being that, when asked to become a surety for her husband, she might not feel the same freedom of action as she would if asked to become a surety for some one who did not exercise so much influence over her. The statutes are so different in the various states, have received such different constructions, and are being made the subject of such frequent amendment, that no attempt will be made here to classify them, but reference should be had to the statute whenever it is desired to ascertain the rights of a married woman in a particular state.

*Ultra Vires Acts of a Corporation.*

A corporation has no power to enter into contracts that are not within the express or implied powers of its charter, or that are forbidden by the statutes of the state in which it is formed. Acts which are not within its powers are termed "ultra vires." For this reason, a corporation, generally, has no right to become a surety unless it is formed for that purpose, or it becomes such in the regular course of its business.<sup>169</sup> In these days many corporations have been formed for the very purpose of becoming sureties, and their contracts of suretyship are within their powers;<sup>170</sup> but, unless a corporation becomes a

<sup>166</sup> *Worrell v. Forsyth*, 141 Ill. 22, 30 N. E. 673.

<sup>167</sup> *Athol Mach. Co. v. Fuller*, 107 Mass. 437; *West v. Laraway*, 28 Mich. 464; *Gwynn v. Gwynn*, 31 S. C. 482, 10 S. E. 221.

<sup>168</sup> In Arkansas a married woman cannot become surety on an official bond. *Hyner v. Dickinson*, 32 Ark. 776.

<sup>169</sup> *Helms Brewing Co. v. Flannery*, 137 Ill. 300, 27 N. E. 286; *Arnot v. Erie R. Co.*, 67 N. Y. 315; *Philadelphia & R. R. Co. v. Knight*, 124 Pa. 58, 16 Atl. 492; *Green Bay & M. R. R. Co. v. Union S. Co.*, 107 U. S. 98, 2 Sup. Ct. 221, 27 L. Ed. 413.

<sup>170</sup> *Cramer v. Tittle*, 72 Cal. 12, 12 Pac. 869; *Gans v. Carter*, 77 Md. 1, 25 Atl. 663; *Steel v. Auditor General*, 111 Mich. 381, 69 N. W. 738; *Hurd v. Railroad Co.*, 33 Hun (N. Y.) 109.

surety for the purpose of increasing its trade or business,<sup>171</sup> and is within the scope of its business, its contracts could not be enforced.<sup>172</sup> Thus, while a bank, in transferring a promissory note, which it owned, might find it necessary to guaranty its payment in order to effect the transfer, and thus receive a benefit,<sup>173</sup> it could not guaranty the note of some third person as an act of friendship, for the accommodation of such third person; the bank having no interest in the giving of the note.<sup>174</sup> A railway company would have no power to guaranty the payment of bonds issued by another corporation,<sup>175</sup> unless such bonds had been issued in aid of the road, as would be the case where cities or counties have issued bonds in aid of the construction of a railroad. As the company might have issued its own bonds for that purpose, it was held that it might guaranty bonds which accomplished the same end.<sup>176</sup>

To make a contract of suretyship by a corporation within its powers, on the ground that the contract was in furtherance of its business, the contract must be one which causes a direct benefit, and not one which may indirectly benefit. Thus, while

<sup>171</sup> *Helms Brewing Co. v. Flannery*, 137 Ill. 309, 27 N. E. 286; *Fuld v. Brewing Co.* (Com. Pl.) 18 N. Y. Supp. 456.

<sup>172</sup> *First Nat. Bank of Gadsden v. Winchester*, 119 Ala. 168, 24 South. 351, 72 Am. St. Rep. 904. A corporation is not estopped to set up *ultra vires* as a defense. *Best Brewing Co. v. Klassen*, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26; *Lucas v. White Line T. Co.*, 70 Iowa, 541, 30 N. W. 771, 59 Am. Rep. 449.

<sup>173</sup> *Talman v. Rochester City Bank*, 18 Barb. (N. Y.) 123; *People's Bank of Belleville v. Bank*, 101 U. S. 181, 25 L. Ed. 907. Where a railroad company, without authority, guaranteed the interest coupons of the bonds of another railroad company, and subsequently became the owner of the bonds, it would be liable to a person to whom the bonds were transferred afterwards: the guaranty not having been canceled. *Arnot v. Railroad Co.*, 67 N. Y. 315.

<sup>174</sup> *Hall v. Auburn Co.*, 27 Cal. 256, 87 Am. Dec. 75; *Lucas v. White Line T. Co.*, 70 Iowa, 541, 30 N. W. 771, 59 Am. Rep. 449; *Lafayette Sav. Bank v. St. Louis Stoneware Co.*, 2 Mo. App. 299; *Norton v. Bank*, 61 N. H. 589, 60 Am. Rep. 334; *National Park Bank v. German Co.*, 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673; *Culver v. Real Estate Co.*, 91 Pa. 367.

<sup>175</sup> *Elevator Co. v. Railroad Co.*, 85 Tenn. (1 Pickle) 703, 5 S. W. 52, 4 Am. St. Rep. 798.

<sup>176</sup> *Philadelphia & R. R. Co. v. Knight*, 124 Pa. 58, 16 Atl. 492; *Chicago, R. I. & P. R. Co. v. Howard*, 7 Wall. (U. S.) 392, 19 L. Ed. 117.

a brewing company might guaranty the rent of a place where its products are to be sold,<sup>177</sup> or a lumber company might become surety for a contractor who is to buy lumber from it,<sup>178</sup> a corporation would not be liable as a surety on an appeal bond, although the appeal might affect it indirectly, as making appeals in court cannot be said to be in the line of trade.<sup>179</sup>

A corporation, however, will be liable upon a negotiable note given as security, if it come into the hands of a purchaser for value without notice.<sup>180</sup>

*Statutory Incapacity.*

Sometimes certain classes of persons are prohibited by statute from entering into particular contracts of suretyship; but the rule is clear that, if such persons do enter into contracts of that nature, they are bound nevertheless.<sup>181</sup> In the absence of statutory provisions, an attorney may become a surety for his client;<sup>182</sup> but, if he violates a statute or a rule of court in this respect, he will not be allowed to take advantage of his own wrong.<sup>183</sup> The same rule applies to a judge

<sup>177</sup> *Winterfield v. Brewing Co.*, 96 Wis. 239, 71 N. W. 101.

<sup>178</sup> *Wittmer Lumber Co. v. Rice*, 23 Ind. App. 586, 55 N. E. 868.

<sup>179</sup> *Best Brewing Co. v. Klassen*, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 785, 76 Am. St. Rep. 26. So a corporation engaged in the manufacture and sale of musical instruments would not be liable on a guaranty of the expenses of a musical festival. *Davis v. Railroad Co.*, 131 Mass. 258, 41 Am. Rep. 221.

<sup>180</sup> *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322. See Norton, *Bills & Notes* (3d Ed.) p. 222.

<sup>181</sup> *Branch Bank at Decatur v. Douglass*, 9 Ala. 853; *Ullery v. Kott*, 15 Colo. App. 138, 61 Pac. 189; *Cunningham v. Tucker*, 14 Fla. 251; *Ohio & M. Ry. Co. v. Hardy*, 64 Ind. 454; *Cook v. Caraway*, 29 Kan. 41; *Holandsworth v. Commonwealth*, 11 Bush (Ky.) 617; *State ex rel. Howell County v. Findley*, 101 Mo. 368, 14 S. W. 111; *Tessier v. Crowley*, 17 Neb. 207, 22 N. W. 422; *Kohn v. Washer*, 69 Tex. 67, 6 S. W. 551, 5 Am. St. Rep. 28.

<sup>182</sup> *Abbott v. Zeigler*, 9 Ind. 511; *Walker v. Holmes*, 22 Wend. (N. Y.) 614.

<sup>183</sup> *Jack v. People*, 19 Ill. 57; *Ohio & M. Ry. Co. v. Hardy*, 64 Ind. 454; *Wright v. Schmidt*, 47 Iowa, 233; *Cook v. Caraway*, 29 Kan. 41; *Holandsworth v. Commonwealth*, 11 Bush (Ky.) 617; *Morrill v. Lamson*, 138 Mass. 115; *Tessier v. Crowley*, 17 Neb. 207, 22 N. W. 422; *Wallace v. Scoles*, 6 Ohio, 429; *Kohn v. Washer*, 69 Tex. 67, 6 S. W. 551, 5 Am. St. Rep. 28; *Fond du Lac v. Moore*, 58 Wis. 170, 15 N. W. 782. It is bad policy for an attorney to become surety for his client.

of court.<sup>184</sup> Where a statute provides that sureties, in certain cases, shall be residents of the county<sup>185</sup> or state<sup>186</sup> where the contract is executed, the statute is directory merely, and a surety will be estopped from claiming his nonresidence as a defense.<sup>187</sup>

If a statute require more than one surety upon a bond, a surety who has undertaken to be solely liable would be bound.<sup>188</sup> The object of the statute is for the better protection of the obligee, and not for the benefit of the surety.

#### FRAUD.

**54. If a surety is induced to enter into his contract by reason of any false statements, or the concealment of material facts by the creditor or obligee, or by the authority or with the knowledge of the latter, the surety is not liable.**

and is unnecessary in these days of surety companies. It looks like eagerness to secure the case, and clients will begin to expect it. It is especially undesirable in the case of an appeal, as it looks as if the attorney felt that he was to blame in not winning the suit in the lower court; and, as he has made himself liable in event of being unsuccessful on appeal, the client may be inclined to allow the attorney to take care of the matter without assistance.

<sup>184</sup> State ex rel. Howell County v. Findly, 101 Mo. 368, 14 S. W. 111.

<sup>185</sup> State v. Flinn, 77 Ala. 100.

<sup>186</sup> Commonwealth v. Ramsay, 2 Duv. (Ky.) 385; Board of School Directors of Parish of Madison v. Brown, 33 La. Ann. 383.

<sup>187</sup> Gossett v. Cashell, 14 La. 245.

<sup>188</sup> Justices of Inferior Court of Scriven County v. Ennis, 5 Ga. 569; People v. Race, 2 Ill. App. (2 Bradw.) 563. Bank of Brighton v. Smith, 5 Allen, 413; People v. Johr, 22 Mich. 461; Gray v. School District of Norfolk, 35 Neb. 438, 53 N. W. 377; State v. Benton, 48 N. H. 551; Shaw v. Tobias, 3 N. Y. 188; Cochran v. Wood, 29 N. C. 215; Allen v. Kellam, 94 Pa. 253; Reynolds v. Dechaums, 24 Tex. 174, 76 Am. Dec. 101; Baltimore & O. R. Co. v. Vanderwarker, 19 W. Va. 265. Two sureties will be dispensed with if the bond be signed by a guaranty company. Cramer v. Tittle, 72 Cal. 12, 12 Pac. 869; Travis v. Travis, 48 Hun, 343, 1 N. Y. Supp. 357. A surety is bound, although mortgage security, as required by statute, is not taken. Scotten v. State, 51 Ind. 52. See, also, State v. Wiley, 15 Iowa, 155. Where a by-law requires three sureties to a bond, but only two sign, they are liable. Dalton v. Miami Tribe, 5 Ohio Dec. 42.

It is the duty of a creditor or obligee to use the utmost good faith toward a surety pending negotiations looking toward the contract, and a failure to do so may be set up by the surety as a valid defense when sued, as he has become a surety on a contract which he did not have in contemplation.<sup>189</sup> This rule requires the creditor or obligee to answer all questions asked of him, not only truly, but he must make a full disclosure of everything which would naturally influence the decision of the one about to become a surety;<sup>190</sup> and, further, it is his duty to volunteer information when it is apparent to him that the surety is entering into the contract through ignorance of facts which amount to deception.<sup>191</sup> Fraud may arise from concealment, as well as from a false statement. However, unless asked in regard to a matter, it is not the duty of the creditor or obligee voluntarily to seek the surety,<sup>192</sup> and to disclose facts which are open equally to the knowledge of each party. It is

<sup>189</sup> *Evans v. Keeland*, 9 Ala. 42; *Taylor v. Lohman*, 74 Ind. 418; *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23, 19 Am. Rep. 50; *Franklin Bank v. Stevens*, 39 Me. 532; *STATE v. SOOY*, 39 N. J. Law (10 Vroom) 135; *Farmers' Nat. Bank v. Van Slyke*, 49 Hun, 7, 1 N. Y. Supp. 508; *Frisch v. Miller*, 5 Pa. 310; *Jungk v. Reed*, 9 Utah, 49, 33 Pac. 236; *Rathbone, Sard & Co. v. Frost*, 9 Wash. 162, 37 Pac. 162; *Warren v. Branch*, 15 W. Va. 21; *New Home Sewing Mach. Co. v. Simon*, 104 Wis. 120, 80 N. W. 71. Where sureties sign notes given in a composition with creditors, they will not be liable to such creditors as have a secret agreement with the principal to pay them more. *POWERS DRY GOODS CO. v. HARLIN*, 68 Minn. 193, 71 N. W. 16, 64 Am. St. Rep. 460. A guaranty was given for the payment of pig iron. By a secret agreement between the seller and buyer, the latter was to pay more than the market price; the excess going toward an old debt. The guarantor was not liable, as he reasonably might suppose that the iron would be supplied at the market price. *PIDCOCK v. BISHOP*, 3 L. J. R. K. B. 109, 3 B. & C. 605. A surety who has been induced to become such by fraudulent representations is not estopped from setting up the defense of fraud. *Mellick v. First Nat. Bank of Tama City*, 52 Iowa, 94, 2 N. W. 1021.

<sup>190</sup> *Bank of Monroe v. Anderson Co.*, 65 Iowa. 692, 22 N. W. 929; *Remington Co. v. Kezertee*, 49 Wis. 409, 5 N. W. 809.

<sup>191</sup> *Franklin Bank v. Cooper*, 39 Me. 542.

<sup>192</sup> *NORTH BRITISH INS. CO. v. LLOYD*, 10 Exch. 523. It is not the duty of the creditor to disclose the fact that the principal is indebted to him, if the guaranty is not to apply to the arrears. *Palatine Co. v. Crittenden*, 18 Mont. 413, 45 Pac. 555. Or that the creditor is entering into other contracts with the principal without security.

the duty of the surety to protect himself, and to ascertain the risk he is incurring, and he cannot, by his neglect, throw the burden on the creditor or obligee to inform him as to matters which he could ascertain for himself without difficulty.<sup>192</sup> Were the creditor required to dwell upon the risk the surety is running by entering into such a contract, it would be well-nigh impossible to find any one willing to become a surety.<sup>194</sup> Thus, if the principal be insolvent, and that fact be known to the creditor, and the surety ask no questions, nor says anything to indicate his lack of knowledge upon that point, and such fact could be ascertained by the surety, the creditor is not required voluntarily to disclose that fact, although the creditor may feel pretty sure that the surety ultimately will be called upon for payment;<sup>195</sup> but where a person becomes a surety upon a bond of an employé, and the obligee knows that such employé is, at that time, a defaulter, the surety will not be liable upon the bond, although he makes no inquiry upon that point, and the surety and obligee do not meet pending negotiations.<sup>196</sup> While a person might be willing to as-

*Booth v. Storrs*, 75 Ill. 438. Or that the creditor is not taking any other security for the property sold than that of the surety, although the surety thinks otherwise, if there be no fraudulent motive on the part of the creditor. *Warren v. Branch*, 15 W. Va. 21.

<sup>192</sup> *Roper v. Sangamon Lodge*, 91 Ill. 518, 33 Am. Rep. 60; *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 231. The strict rule applicable to contracts of insurance, that all material facts must be disclosed, does not apply to guaranties, if there be no fraud. This is peculiar to insurance, for the insured knows, and the insurer does not. *NORTH BRITISH INS. CO. v. LLOYD*, 10 Exch. 523.

<sup>194</sup> *Sherman v. Harbin*, 125 Iowa, 174, 100 N. W. 629; *Wythes v. Labouchere*, 3 De G. & J. 593, 5 Jur. (N. S.) 499.

<sup>195</sup> *Van Arsdale v. Howard*, 5 Ala. 596; *Ham v. Greve*, 34 Ind. 18; *Farmers' & Drovers' Nat. Bank v. Braden*, 145 Pa. 473, 22 Atl. 1045; *Magee v. Manhattan Life Ins. Co.*, 92 U. S. 93, 23 L. Ed. 699.

<sup>196</sup> *Guardian Fire & Life Assur. Co. v. Thompson*, 68 Cal. 208, 9 Pac. 1; *Drabek v. Grand Lodge*, 24 Ill. App. 82; *Wilson v. Monticello*, 85 Ind. 10; *Bank of Monroe v. Anderson Co.*, 65 Iowa, 692, 22 N. W. 929; *Belleview Loan & Building Ass'n v. Jeckel*, 104 Ky. 159, 46 S. W. 482; *Franklin Bank v. Cooper*, 39 Me. 542; *Hudson v. Miles*, 185 Mass. 582, 71 N. E. 63, 102 Am. St. Rep. 370; *Traders' Ins. Co. v. Herber*, 67 Minn. 106, 69 N. W. 701; *Third Nat. Bank v. Owen*, 101 Mo. 558, 14 S. W. 632; *STATE v. SOOY*, 39 N. J. Law, 135; *Wells, Fargo & Co.'s Exp. v. Walker*, 9 N. M. 170, 50 Pac. 353, 923; *United States*

sume the risk of becoming a surety for an insolvent person, it is not to be supposed that any one knowingly would go upon the bond of a defaulting employé, and it is the duty of the obligee to ascertain whether the surety has knowledge of that fact. The continuance of a dishonest agent is an act so expressive of trust and confidence that it is tantamount to a declaration to that effect.<sup>197</sup> If the employer could not have failed to draw the inference, from facts known to him, that an employé is a defaulter, he is charged with knowledge.<sup>198</sup>

A statement that the contract is a mere matter of form is not fraudulent, as the making of any contract is a matter of form, and such statements are so common, when asking a person for his signature to a contract, that no one should be deceived.<sup>199</sup>

*Concealment by Agent.*

Knowledge by one employé or agent of the obligee of defaults by another employé cannot be imputed to the employer, so as to free a surety from liability upon the bond of a defaulting employé;<sup>200</sup> nor will a surety be free from liability on account of an incorrect statement made, without authority,

*Life Co. v. Salmon*, 91 Hun, 535, 36 N. Y. Supp. 830; *Smith v. Josselyn*, 40 Ohio St. 409; *Wayne v. Commercial Bank*, 52 Pa. 343; *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 231; *Wilmington v. Ling*, 18 S. C. 116; *Screwmen's Benevolent Ass'n v. Smith*, 70 Tex. 168, 7 S. W. 798. *Connecticut General Life Ins. Co. v. Chase*, 72 Vt. 176, 47 Atl. 825, 53 L. R. A. 510; *SMITH v. BANK OF SCOTLAND*, 1 Dow, 272. Where the principal is heavily indebted, and the creditor requires an additional guaranty which is retroactive, so that the guarantor, on signing, becomes liable immediately for past indebtedness, the failure to disclose these facts, and the additional fact that another guarantor was involved already, will discharge the guarantor. *LEE v. JONES*, 17 C. B. (N. S.) 482.

<sup>197</sup> *STATE v. SOOY*, 39 N. J. Law, 135; *Dinsmore v. Tidball*, 34 Ohio St. 411.

<sup>198</sup> *National Bank of Asheville v. Fidelity & C. Co.*, 89 Fed. 819, 32 C. C. A. 355.

<sup>199</sup> *Wright v. Remington*, 41 N. J. Law (12 Vroom) 48, 32 Am. Rep. 180; *McMinn v. Patton*, 92 N. C. 371; *Smyley v. Head*, 2 Rich. Law (S. O.) 590, 45 Am. Dec. 750; *Oregon Nat. Bank of Portland v. Gardner*, 13 Wash. 154, 42 Pac. 545.

<sup>200</sup> *Cawley v. People*, 95 Ill. 249; *Board of Sup'rs of Monroe County v. Otis*, 62 N. Y. 88.



by an agent of the obligee.<sup>201</sup> If, however, the default of one employé is known to another within the scope of whose duties it would be to act upon the discovery of such default, his concealment of the default would free the surety for the defaulting employé from liability as to future defaults.

*Reckless Statements.*

Statements may be fraudulent where they are recklessly made, and the person making them does not know whether they be true or false. Thus, where a banking association, pursuant to the provisions of law, ignorantly published a statement purporting to give full and complete knowledge of the condition of the bank for official information, from which it appeared that its affairs were being prudently and honestly administered, and from which the inference would be drawn rightly that the cashier was trustworthy, when in fact he was guilty of repeated embezzlements and fraud, which could have been discovered easily by the exercise of slight diligence on the part of the association,<sup>202</sup> persons who were induced by such statement to become sureties for the cashier were not liable.

*Misrepresentations in Good Faith.*

Concealment may be undue, although not willful, nor intentional, nor with any view to gaining an advantage. If the creditor or obligee has no knowledge of facts, he cannot be said to be guilty of fraudulent statements or concealment, although he might have discovered them.<sup>203</sup> To constitute

<sup>201</sup> United States Fidelity & Guaranty Co. v. Muir, 115 Fed. 264, 53 O. C. A. 56.

<sup>202</sup> Graves v. Lebanon Nat. Bank, 73 Ky. (10 Bush) 23, 19 Am. Rep. 50; Deposit Bank of Midway's Assignee v. Hearne, 104 Ky. 819, 48 S. W. 160.

<sup>203</sup> Home Ins. Co. v. Holway, 55 Iowa, 571, 8 N. W. 457, 39 Am. Rep. 179; Tapley v. Martin, 116 Mass. 275; Rowne v. Bank, 45 N. J. Law. 361; Wayne v. Bank, 52 Pa. 343. The published reports of a bank, which have not been made to induce a person to sign the bond of an employé, will furnish no relief to a surety, although he relied upon them, and they failed to show defalcations of such employé; the latter having concealed them by false entries. Lieberman v. First Nat. Bank, 2 Pennewill's (Del.) 416, 45 Atl. 901, 48 L. R. A. 514, 82 Am. St. Rep. 414; Ashuelot Sav. Bank v. Albee, 63 N. H. 152, 56 Am. Rep. 501. This might have been otherwise if there had been willful

fraud, in such a case, the obligee would have to be guilty of willful ignorance or the grossest neglect. It not infrequently happens that, at the time an employé gives a bond for the faithful performance of his services, he is a defaulter, and that fact could have been ascertained without difficulty by an examination of his accounts. But if the obligee, in ignorance of the default, should say that the employé always had performed his work satisfactorily, he could not be successfully charged with fraud.<sup>204</sup>

An honest misstatement made by the creditor, which is known by the surety not to be true, cannot be taken advantage of by the latter; nor could a misstatement which was not relied on; but an incorrect statement of a material fact, though honestly made, would free a surety from liability.<sup>205</sup>

*Immaterial Facts.*

It is not incumbent upon the creditor to disclose facts which are not material,<sup>206</sup> though it is not within the province either of the creditor or of the surety to decide whether certain facts are or are not material, but that fact must be adjudicated, as any other would be.<sup>207</sup>

The obligee is not bound to disclose mere irregularities, nor omissions not amounting to dishonesty or unfaithfulness.<sup>208</sup> The sureties are supposed to know the character of their principal.

It is not fraud upon the sureties that the principal was behind in his accounts,<sup>209</sup> if the obligee does not know or have

ignorance, or gross negligence in not discovering the defalcations. See preceding paragraph.

<sup>204</sup> *Mutual Life Ins. Co. v. Willcox*, 8 Biss. 197, Fed. Cas. No. 9,979.

<sup>205</sup> *Isaac Harter Co. v. Pearson*, 26 Ohio Cir. Ct. R. 601.

<sup>206</sup> *Comstock v. Gage*, 91 Ill. 328.

<sup>207</sup> It is not a question of good memory or of good sense. The surety cannot know what is passing in the mind of the other party. *RAILTON v. MATHEWS*, 10 Clark & F. 934.

<sup>208</sup> *Home Co. v. Holway*, 55 Iowa, 571, 8 N. W. 457, 39 Am. Rep. 179; *BOSTWICK v. VAN VOORHIS*, 91 N. Y. 353; *Screwmen's Benevolent Ass'n v. Smith*, 70 Tex. 168, 7 S. W. 793.

<sup>209</sup> *Roper v. Sangamon Lodge*, 91 Ill. 518, 33 Am. Rep. 60; *Watertown Fire Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196; *Pittsburg, Ft. W. & C. Ry. Co. v. Shaeffer*, 59 Pa. 350; *Wilmington C. & A. R. Co. v. Ling*, 18 S. C. 116.

reason to suppose that he is guilty of actual default. The obligee is not required to disclose information which does not relate to the business which is the subject of the suretyship, nor facts which relate to the general character of the principal, as that he gambles;<sup>210</sup> nor is the obligee bound to disclose mere rumors.<sup>211</sup>

*Fraud by Principal or by Third Persons.*

In order that a surety may be free from liability upon his contract by reason of fraud pending its formation, it is not requisite that the creditor personally make the false statement; but it is requisite that he authorize or be connected with them in some way.<sup>212</sup> It is sufficient if he have notice that they have been made to the creditor,<sup>213</sup> as would be the case if he were standing by at the time.<sup>214</sup> The surety cannot claim freedom from liability when the false statements were made by the principal without the knowledge of the creditor or obligee.<sup>215</sup> Thus, where a person signs an instrument without

<sup>210</sup> *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 231.

<sup>211</sup> *State, to Use of Southern Bank, v. Atherton*, 40 Mo. 209.

<sup>212</sup> *Marks v. First Bank*, 79 Ala. 550, 58 Am. Rep. 620; *Davis Sewing Mach. Co. v. Buckles*, 89 Ill. 237; *LUCAS v. OWENS*, 113 Ind. 521, 16 N. E. 196; *Bank of Monroe v. Anderson Co.*, 65 Iowa, 692, 22 N. W. 929; *Martin v. Campbell*, 120 Mass. 126; *Beath v. Chapoton*, 115 Mich. 506, 73 N. W. 806, 69 Am. St. Rep. 589; *Linn County v. Farris*, 52 Mo. 75, 14 Am. Rep. 389; *Page v. Krekey*, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. Rep. 731, affirming 63 Hun, 629, 17 N. Y. Supp. 764; *Kulp v. Brant*, 162 Pa. 222, 29 Atl. 729; *Riley v. Relfert* (Tex. Civ. App.) 32 S. W. 185; *Quinn v. Hard*, 43 Vt. 375, 5 Am. Rep. 284; *Griffith v. Reynolds*, 4 Grat. (Va.) 46; *Wallace v. Wilder* (C. C.) 13 Fed. 707; 40 Cent. Dig. col. 1736. A surety is estopped to deny liability because he thought the bond was other than it was, if he is not prevented from reading it through any fraud of the obligee. *Johnston v. Patterson*, 114 Pa. 398, 6 Atl. 746.

<sup>213</sup> *Casoni v. Jerome*, 58 N. Y. 315.

<sup>214</sup> *First Nat. Bank v. Terry* (C. C.) 135 Fed. 621.

<sup>215</sup> *Davis Sewing Mach. Co. v. Buckles*, 89 Ill. 237; *Lucas v. Owens*, 113 Ind. 521, 16 N. E. 196; *Taylor County v. King*, 78 Iowa, 153, 34 N. W. 774, 5 Am. St. Rep. 666; *Sebastian v. Johnson*, 2 Duv. (Ky.) 101; *State v. Peck*, 53 Me. 284; *Hudson v. Miles*, 185 Mass. 582, 71 N. E. 68, 102 Am. St. Rep. 370; *McCormick v. Bay City*, 23 Mich. 457; *Graves v. Tucker*, 10 Smedes & M. (Miss.) 9; *Powers v. Clarke*, 127 N. Y. 417, 28 N. E. 402; *Dangler v. Baker*, 35 Ohio St. 673; *Rother-*

reading it, upon the representation of the principal that it is different from what it really is, and the creditor or obligee is not aware of the fraud, the surety is bound nevertheless;<sup>216</sup> nor can the surety claim that he is not liable, where the false representations are made by a third person.<sup>217</sup>

*Waiver of Defense.*

If a surety, after knowledge of the fact that his contract was procured through false representations, but in ignorance of his legal rights, obtain an extension of time, in consideration of his promise of payment, he will be deemed to have waived his defense, and will be liable.<sup>218</sup>

**DURESS.**

**55. A surety is not liable if he executed his contract under duress.**

The mutual consent which is essential to every contract must be real;<sup>219</sup> hence, if a contract of suretyship be executed by a surety under duress, he will not be bound.<sup>220</sup> As in the case of a contract entered into through fraud, he is making a contract which he did not intend to make. Thus, where a creditor induced a wife, who was in a delicate condition, to indorse her husband's note under threat to send him to state's prison if she refused, it was held that she might avail herself of the defense of duress.<sup>221</sup>

mal v. Hughes, 134 Pa. 510, 19 Atl. 677; Griffith v. Reynolds, 4 Grat. (Va.) 46; Wallace v. Wilder (C. C.) 13 Fed. 707.

<sup>216</sup> Metropolitan Loan Ass'n v. Esche, 75 Cal. 513, 17 Pac. 675; Wright v. Flinn, 33 Iowa, 159; Glenn v. Statler, 42 Iowa, 107.

<sup>217</sup> Brown v. Davenport, 76 Ga. 799; STATE v. SOOY, 39 N. J. Law, 135.

<sup>218</sup> Western Electric Co. v. Hart, 103 Mich. 477, 61 N. W. 867; Rindskopf v. Doman, 28 Ohio St. 516. Likewise, a guarantor waives his rights when he goes on after discovering the misrepresentations made to him. Emerson-Newton Implement Co. v. Cupps (N. D. 1906) 108 N. W. 796; Drovers' Live Stock Commission Co. v. Charles Wolff Packing Co. (Kan.) 86 Pac. 128.

<sup>219</sup> Clark, Contracts (2d Ed.) p. 195.

<sup>220</sup> Small v. Currie, 2 Drew. 102.

<sup>221</sup> Ingersoll v. Roe, 65 Barb. (N. Y.) 346. Where a mortgagee of cattle was compelled to guaranty a note of the mortgagor before the

*Duress by Principal.*

Duress by the principal will not free a surety from liability, if the obligee take the obligation in good faith.<sup>222</sup>

**ILLEGALITY.****56. A surety is not bound if the contract be illegal.**

An illegal contract is void, and a surety thereon incurs no liability.<sup>223</sup> If a note be void for usury, it cannot be enforced against a surety.<sup>224</sup> If, however, the principal cannot plead usury, the surety cannot.<sup>225</sup>

A note given, in a composition with creditors, to one creditor in excess of the amount to which he would be entitled under

cattle would be surrendered to him by one who had no right to retain them, he was held not liable. *Tandy v. Elmore-Cooper Live Stock Co.*, 113 Mo. App. 409, 87 S. W. 614. But a threat made by a husband to his wife, with the knowledge of the payee of a note, that he would take poison unless she signed as surety, was not duress. *Wright v. Remington*, 41 N. J. Law (12 Vroom) 48, 32 Am. Rep. 180. Nor is a threat to file objections to a sale of real estate, unless allowed claims against the estate were guaranteed. *Wiggenhorn v. Fitzgerald*, 5 Neb. (Unoff.) 457, 98 N. W. 1079.

<sup>222</sup> *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446. Whether duress of the principal will be a defense to the surety, see post, § 133.

<sup>223</sup> *Jack v. Sinsheimer*, 125 Cal. 563, 58 Pac. 130; *Howard v. Smith*, 91 Tex. 8, 38 S. W. 15. See ante, § 52, as to illegal consideration. If bail be taken illegally, the sureties are not bound. *State v. Vion*, 12 La. Ann. 688. An Indiana statute provided that express companies should not transact business without first complying with certain formalities. A company which had not complied with the formalities was not allowed to recover upon a bond given by one of their agents, as it was considered an illegal contract. *Daniels v. Barney*, 22 Ind. 207. See post, § 133.

<sup>224</sup> *Gray's Ex'rs v. Brown*, 22 Ala. 262; *Stockton v. Coleman*, 39 Ind. 106; *Conger v. Babbet*, 67 Iowa, 13, 24 N. W. 569; *Huntress v. Patten*, 20 Me. (2 App.) 28; *Wimer v. Shelton*, 7 Mo. 266; *Keim v. Avery*, 7 Neb. 54; *Heidenheimer v. Mayer*, 42 N. Y. Super. Ct. 506; 40 Cent. Dig. col. 1648.

<sup>225</sup> *Brownell v. Freese*, 35 N. J. L. 285, 10 Am. Rep. 239; *Pugh v. Cameron*, 11 W. Va. 523. This would be the case where the principal and surety were in different states, and the usury laws were different.

the composition, and without the knowledge of the other creditors, would be against public policy, and therefore void.<sup>226</sup>

*Sunday Contracts.*

A contract made on Sunday is valid <sup>227</sup> unless the common-law rule has been changed by statute.<sup>228</sup>

**STATUTORY BOND—DEFINITION.**

**57. A statutory bond is one given pursuant to a statute.**

**SAME—VALIDITY.**

**58. A bond which complies substantially with a statute is valid, though it does not conform to its requirements.**

**VOLUNTARY BOND—DEFINITION.**

**59. A voluntary bond is one given when not required by statute.**

**SAME—VALIDITY.**

**60. A voluntary bond is a binding obligation.**

In many cases where a bond has been given because one is required by statute, the parties have failed to conform to all of the requirements of the statute; but such bonds are binding obligations notwithstanding.<sup>229</sup> It will be deemed sufficient,

<sup>226</sup> *Morrison, Plummer & Co. v. Schlessinger*, 10 Ind. App. 665, 38 N. E. 493; *Bannantine v. Cantwell*, 27 Mo. App. 658.

<sup>227</sup> *Richmond v. Moore*, 107 Ill. 429, 47 Am. Rep. 445.

<sup>228</sup> *Carrick v. Morrison*, 2 Marv. (Del.) 157, 42 Atl. 447. Where the contract is executed on Sunday, but is not delivered until the following day, it is valid, as it takes effect from the delivery. *Commonwealth v. Kendig*, 2 Pa. 448. Contra, *Parker v. Pitts*, 73 Ind. 597, 38 Am. Rep. 155. The contract is not illegal because the negotiations took place on Sunday, if the contract was not executed then. *Tyler v. Waddingham*, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657.

<sup>229</sup> *Stephens v. Crawford*, 3 Ga. (3 Kelly) 499; *People, to Use of City of Mt. Vernon, v. Pace*, 57 Ill. App. 674; *Sheppard v. Collins*, 12 Iowa, 570; *McCracken v. Todd*, 1 Kan. 148; *Cobb v. Curts*, 4 Litt. (Ky.) 235; *Grocers' Bank, President, Directors, etc., v. Kingman*, 82

although the form<sup>220</sup> or the language prescribed by the statute is not followed, as the provisions of the statutes are directory merely, and for the benefit of the beneficiaries.

*Bond Containing More Than the Statutory Requirements.*

Such a bond will be valid, although it contain more than is required by statute,<sup>221</sup> as that it covers past as well as future delinquencies, and the statute required a bond for future delinquencies only;<sup>222</sup> or where the penalty for which the sureties became bound is larger than that fixed by statute.<sup>223</sup> The sureties in such case will be liable at least for the amount fixed by statute.<sup>224</sup>

*Bond Containing Less Than the Statutory Requirements.*

Sureties will be liable, though the penalty named is less than the law prescribes.\* Where the statute requires each surety

Mass. 473; *People v. Johr*, 22 Mich. 461; *Boykin v. State*, 50 Miss. 375; *Riggs v. Miller*, 84 Neb. 606, 52 N. W. 567; *Kelly v. McCormick*, 28 N. Y. 318; *Skellinger v. Yendes*, 12 Wend. (N. Y.) 306; *Governor, to Use of Chambers, v. Witherspoon*, 10 N. C. 42; *Wright v. Keyes*, 103 Pa. 567. A guardian's bond securing two or more estates is valid, although the proper form would be a separate bond for each. *Ordinary v. Heishon*, 42 N. J. Law, 15. A surety on a note for a loan of the school fund is liable, although the statute requires such notes to be secured by a mortgage on real estate. *Scotten v. State*, 51 Ind. 52. See, also, *State v. Wiley*, 15 Iowa, 155.

<sup>220</sup> *Johnston v. Gwathney*, 2 Bibb. (Ky.) 186, 4 Am. Dec. 694; *Mathews v. Lee*, 25 Miss. 417; *Governor, to Use of Henderson, v. Matlock*, 9 N. C. 366; *McCaraher v. Commonwealth*, 5 Watts & S. (Pa.) 21, 39 Am. Dec. 506; *Treasurers v. Stevens*, 2 McCord (S. C.) 107.

<sup>221</sup> *McFadden v. Hewett*, 78 Me. 24, 1 Atl. 893. But such bonds will not be valid if extorted from the principal as a condition precedent to his entering upon the duties of his office. *Boswell v. Lainhart*, 2 La. 397; *Treasurers of State v. Bates*, 2 Balley (S. C.) 362; *United States v. Mynderse*, 11 Blatchf. 1, Fed. Cas. No. 15,851.

<sup>222</sup> *Franklin Bank v. Cooper*, 36 Me. 179. A bond is valid, although it makes the sureties liable for the acts of the deputies of the principal, as well as for the acts of the principal. *Chadwick v. United States (C. C.)* 3 Fed. 750.

<sup>223</sup> *Carver v. Carver*, 77 Ind. 498; *Henderson v. Matlock*, 9 N. C. 366; *Hibbs v. Blair*, 14 Pa. 413. Contra, *Roberts v. State*, 34 Kan. 151, 8 Pac. 246; *Toles v. Adeo*, 84 N. Y. 222.

<sup>224</sup> *Graham v. State*, 66 Ind. 386; *State, to Use of Guernsey County Com'rs, v. Findley*, 10 Ohio, 51; *State v. Purcell*, 31 W. Va. 44, 5 S. E. 301; *United States v. Ambrose (C. C.)* 2 Fed. 552.

\**Carver v. Carver*, 77 Ind. 498; *Freeman v. Davis*, 7 Mass. 200.

to be liable for the entire penalty, and the bond stipulates that each surety shall be liable for a proportionate part only of the penalty, the obligation is valid.

A surety will not be allowed to question the validity of his bond because it was not acknowledged by him.<sup>225</sup>

#### *Voluntary Bonds.*

Bonds for the faithful performance of services by a public officer are given sometimes when such bonds are not required by law, or where they so far deviate from the requirements of a statute that they cannot be deemed to be statutory bonds. Such bonds are called "voluntary bonds," and, unless they contravene the policy of the law, or are forbidden by statute, are valid as common-law bonds<sup>226</sup>—that is, bonds valid under the rules of the common law—and will have the force of an undertaking to secure a private obligation. Thus, a bond of a sheriff executed to the state, instead of to the county, as required by a statute, would be valid.<sup>227</sup> So, sureties would be liable up-

<sup>225</sup> Board of Sup'rs of Washington County v. Dunn, 27 Grat. (Va.) 608.

<sup>226</sup> Williamson v. Woolf, 37 Ala. 298; Farmers' & Mechanics' Bank of Delaware v. Polk, 1 Del. Ch. 167; Sheppard v. Collins, 12 Iowa, 570; Johnson v. Weatherwax, 9 Kan. 75; Thompson v. Buckhannon, 2 J. J. Marsh. (Ky.) 416; St. Joseph County, Board of Sup'rs of, v. Coffenbury, 1 Mich. 355; State v. Harney, 57 Miss. 863; Ordinary v. Helshon, 42 N. J. Law, 15; Bank of Northern Liberties v. Cresson, 12 Serg. & R. (Pa.) 306; Wright v. Keyes, 103 Pa. 567; Dignan v. Shields, 51 Tex. 322; United States v. Bradley, 10 Pet. (U. S.) 361, 9 L. Ed. 448.

Contra, Williams v. Skipwith, 34 Ark. 529; State v. Helsey, 56 Iowa, 404, 9 N. W. 327.

The rule is the same as to judicial bonds, and they will be held good as common-law bonds if not according to statute. Purcell v. Steele, 12 Ill. 93; Endress v. Ent, 18 Kan. 236; Lartigue v. Baldwin, 5 Mart. O. S. (La.) 196; Mosher v. Murphy, 121 Mass. 276; Morse v. Hodsdon, 5 Mass. 314; United States v. Linn, 15 Pet. (U. S.) 290, 10 L. Ed. 742.

<sup>227</sup> Jefferson County, Commissioners of, v. Lineberger, 3 Mont. 231, 35 Am. Rep. 462; Thomas v. Hinkley, 19 Neb. 324, 27 N. W. 231; See, however, United States v. Shoup, 2 Idaho, 493, 21 Pac. 656. A bond given to the state, instead of to the township is valid. State v. Hora, 94 Mo. 162, 7 S. W. 116. So is one given to the county, instead of to the state. Johnson v. Fuquay, 1 Dana (Ky.) 514. Or to the wrong



on a bond entered into before a person acting as judge, although he might be acting without right.<sup>232</sup>

#### FORGED SIGNATURES.

**61. A contract of suretyship is valid, although some of the signatures thereto are forged, if the creditor or obligee be innocent.**

#### NAMES SIGNED WITHOUT AUTHORITY.

**62. A surety is liable, though the principal's name be signed by a person without authority.**

#### *Forged Signatures.*

Where a person was asked to sign a note as surety, but refused unless another would execute it first, and the signature of such other person was forged by the principal without the knowledge of the creditor, whereupon the first person signed, he was held liable.<sup>233</sup> Where one of two innocent parties must lose through the deceit of another, the loss should fall upon him who makes the fraud possible.<sup>240</sup> The signature of a surety is an implied assertion of the genuineness of those

county. *Gerould v. Willson*, 81 N. Y. 573, affirming 16 Hun (N. Y.) 530.

<sup>232</sup> *Pritchett v. People*, 1 Gilman (Ill.) 525.

<sup>233</sup> *STONER v. MILLIKIN*, 85 Ill. 218; *Wayne Agricultural Co. v. Cardwell*, 73 Ind. 555; *Hall v. Smith*, 77 Ky. (14 Bush) 604; *Chase v. Hathorn*, 61 Me. 505; *Dole Bros. Co. v. Cosmopolitan Co.*, 167 Mass. 481, 46 N. E. 105, 57 Am. St. Rep. 477; *State v. Hewitt*, 72 Mo. 603; *Kansas City Terra-Cotta Lumber Co. v. Murphy*, 49 Neb. 674, 68 N. W. 1030; *Mosher v. Carpenter*, 13 Hun (N. Y.) 602; *Vass v. Riddick*, 89 N. C. 6; *Bigelow v. Comegys*, 5 Ohio St. 256; *Loew's Adm'r v. Stocker*, 68 Pa. 226; *Trevathan v. Caldwell*, 51 Tenn. (4 Heisk.) 535; *Veach v. Rice*, 131 U. S. 318, 9 Sup. Ct. 730, 33 L. Ed. 163; 40 Cent. Dig. col. 1728. Contra, *Sharp v. Allgood*, 100 Ala. 183, 14 South. 16; *Green v. Kindy*, 43 Mich. 279, 5 N. W. 297. See, also, *Beem v. Farrell* (Iowa) 108 N. W. 1044. Likewise, a guarantor will be bound, although some of the prior names are forged. *Veazle v. Willis*, 6 Gray (Mass.) 90.

<sup>240</sup> *Donnell Mfg. Co. v. Jones*, 49 Ill. App. 327; *Hun v. Nichols*, 1 Salk. 289.

which preceded it;<sup>241</sup> for it is not to be presumed that a man would affix his name to a bond when the prior names were forged, and it is his neglect if he is ignorant of the genuineness of the signatures preceding his own.<sup>242</sup>

*Unauthorized Signatures.*

Where the name of the principal has been signed by an agent, and purports to be so signed, and the principal denies authority of the agent to act for him, the sureties are liable.<sup>243</sup> In such cases the agent would be personally liable, and would be the principal.<sup>244</sup>

**AGENCY.**

**63. A person may enter into a contract of suretyship through an authorized agent.**

**AUTHORITY OF AGENT.**

**64. The agent must pursue his authority strictly.**

**RATIFICATION.**

**65. An unauthorized act, purporting to be done by an agent, may be ratified subsequently, and thus become binding upon a surety.**

**RIGHTS OF PARTNERS AS AGENTS OF EACH OTHER.**

**66. One partner has no implied authority to bind his co-partners, except in the scope of the partnership business.**

<sup>241</sup> Remsen v. Graves, 41 N. Y. 471; Penfield v. Goodrich, 10 Hun (N. Y.) 41. An indorser impliedly warrants that the instrument and all prior signatures are genuine. Norton, Bills & Notes (3d Ed.) p. 162.

<sup>242</sup> York County M. F. Ins. Co. v. Brooks, 51 Me. 506.

<sup>243</sup> Millius v. Shafer, 8 Denio (N. Y.) 60; Holland v. Clark, 67 N. C. 104; Stewart v. Behm, 2 Watts (Pa.) 356; Pelzer v. Campbell, 15 S. C. 581, 40 Am. Rep. 705. But in RUSSELL v. ANNABLE, 109 Mass. 72, 12 Am. Rep. 665, where a firm name was signed by one of the partners without authority, the bond was held void.

<sup>244</sup> WEARE v. SAWYER, 44 N. H. 198.

Contracts of suretyship, like contracts in general, may be entered into by a surety through an agent, and the agency may be established in the same manner as any other agency. Generally, the authority need not be in writing. Neither the creditor nor the principal can act as agent for the surety.<sup>245</sup>

*Scope of Authority.*

An agent may have express authority, or it may be implied in some cases; but, in any event, he must keep strictly within the scope of his authority.<sup>246</sup> Authority may be implied from previous course of dealing. Where the signature of a surety is followed by descriptive words, such as "cashier," the obligation will be binding upon him personally, unless he shows that he had authority to bind a person for whom he was acting.<sup>247</sup>

*Ratification.*

The general rules of agency in regard to ratification apply in contracts of suretyship.<sup>248</sup> Ratification may be inferred from acts;<sup>249</sup> but the burden is upon the creditor to prove ratification.

*Partners as Agents of the Firm.*

The power of a partner to bind his copartners is very similar to that of an officer of a corporation to bind the corporation. The act must be done in the course of the firm busi-

<sup>245</sup> Robinson v. Garth, 6 Ala. 204, 41 Am. Dec. 47; Ennis v. Waller, 3 Blackf. (Ind.) 472; Bent v. Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295; Brent v. Green, 6 Leigh (Va.) 16. The principal can act as agent of the surety for the purpose of delivery. See ante, note 53. And for the purpose of filling blanks. See ante, note 75.

<sup>246</sup> Bryan v. Berry, 6 Cal. 394; Farmington Savings Bank v. Buzzell, 61 N. H. 612; Stovall v. Commonwealth, 84 Va. 246, 4 S. E. 379.

<sup>247</sup> Gardner v. Cooper, 9 Kan. App. 587, 58 Pac. 230, 60 Pac. 540.

<sup>248</sup> State v. Hill, 50 Ark. 458, 8 S. W. 401; Smyth v. Lynch, 7 Colo. App. 383, 43 Pac. 670; Colquitt v. Smith, 76 Ga. 709; Hefner v. Vandalah, 62 Ill. 483, 14 Am. Rep. 106; Hall v. State, 39 Ind. 301; Crawford v. Stirling, 4 Esp. 207. See Tiffany, Agency, p. 46.

<sup>249</sup> Lynch v. Smyth, 25 Colo. 103, 54 Pac. 634; Sweetser v. French, 2 Cush. (Mass.) 309, 48 Am. Dec. 666; Kidder v. Page, 48 N. H. 380; Cookroft v. Claffin, 64 Barb. (N. Y.) 464; Drakeley v. Gregg, 8 Wall. (U. S.) 242, 19 L. Ed. 409. Where the name of a surety has been forged, and he takes no steps after being informed by the principal, he may become liable. State ex rel. McCarty v. Pepper, 31 Ind. 76; State ex rel. Brown v. Baker, 64 Mo. 167, 27 Am. Rep. 214.

ness;<sup>250</sup> a partner having no right to lend the credit of the firm to a stranger as a matter of accommodation merely.<sup>251</sup> One partner, in assigning a note which is the property of the firm, would have the right, if necessary, to guaranty its payment in the firm name without express authority from the other partners. So, where a firm sold a steamboat, and the buyer gave a note for the purchase price to a creditor of the firm in payment of the firm's indebtedness to such creditor, and one partner signed the firm name as sureties to the note, all of the partners would be bound, as such contract of suretyship was in substance an agreement to pay their own debt.<sup>252</sup> A partner who has authority to borrow money for the firm can bind the firm by a guaranty of his own note given for the money borrowed for the firm, although he may have been instructed not to sign the firm name to guaranties.<sup>253</sup>

A note given by a partner for his individual debt, and guarantied by him in the firm's name, could not be enforced by the payee against the firm, in the absence of previous special authority from the other partners, or subsequent ratification by them, for the payee would know that the note was not given for the firm's business; but the same result could be accomplished indirectly, by the partner signing the firm name to a note payable to himself, and then indorsing the note for his own debt, for the holder would become then one for value without notice, and the defense of want of consideration could not be made by the partners, unless the business was one which did not authorize a partner to incur indebtedness on account of the firm.<sup>254</sup>

<sup>250</sup> George, Partnership, p. 213.

<sup>251</sup> Rolston v. Chick, 1 Stew. (Ala.) 526; Mayberry v. Bainton, 2 Har. (Del.) 24; Davis v. Blackwell, 5 Ill. App. 32; Sweetser v. French, 2 Cush. (Mass.) 309, 48 Am. Dec. 666; Osborne v. Thompson, 35 Minn. 229, 28 N. W. 260. Lavery v. Burr, 1 Wend. (N. Y.) 529; McQuewans v. Hamlin, 35 Pa. 517; Avery v. Rowell, 59 Wis. 82, 17 N. W. 875. The other members of the firm would be liable to a purchaser for value without notice, and could not claim to be sureties. First National Bank of Chittenango v. Morgan, 73 N. Y. 593.

<sup>252</sup> Langan v. Hewett, 3 Smedes & M. (Miss.) 122.

<sup>253</sup> Pahlman v. Taylor, 75 Ill. 629; First Nat. Bank of Dubuque v. Carpenter, 41 Iowa, 518.

<sup>254</sup> Norton, Bills & Notes (3d Ed.) p. 183.

Where a partner affixes the firm name to a contract of suretyship without authority, he will be bound, whether the others are or not.<sup>255</sup>

### CONFLICT OF LAWS.

**67. The validity of a contract is determined, as a rule, by the law of the place where it is made; but, if it is to be performed in some other place, its validity is determined by the law of the latter place.**

The general rule of contracts is that a contract which is valid where it is to be performed is valid everywhere,<sup>256</sup> unless made for the purpose of evasion.<sup>257</sup> Thus, a note signed by a married woman as surety in a state where she has the power to enter into such contracts will be enforced against her in another state, although such contract would have been invalid if made in the latter state.<sup>258</sup> However, the courts will not enforce a note, although valid in the state where made, if such note is made invalid in the state where it is sought to be enforced on grounds of public policy, as a note given for a gambling debt.

A promissory note made by a wife as surety for her husband, which is void where made, could be enforced against her land in another state, where she intended to charge it with her debt.<sup>259</sup>

<sup>255</sup> *Whitaker v. Richards*, 134 Pa. 191, 19 Atl. 501, 7 L. R. A. 749, 19 Am. St. Rep. 684; *Avery v. Rowell*, 59 Wis. 82, 17 N. W. 875.

<sup>256</sup> *Clark*, *Contracts* (2d Ed.) p. 342. In the following cases the contract was enforced, because valid in the place where made: *Long v. Templeman*, 24 La. Ann. 564; *Howard v. Fletcher*, 59 N. H. 151; *Russell v. Buck*, 14 Vt. 147. In the following cases the contract was enforced, because valid in the state where it was to be performed: *Cowles v. Townsend*, 37 Ala. 77; *Cross v. Petree*, 10 B. Mon. (Ky.) 413; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Frierson v. Williams*, 57 Miss. 451. Where an agreement to guaranty is made in one state, where valid, it will be enforced, although actually affixed in a state where the contract would be void. *Richter v. Frank* (C. C.) 41 Fed. 859. As a guaranty is made where accepted, the law of that place controls as to its validity. *Irving Nat. Bank v. Ellis* (N. J. Sup.) 64 Atl. 1071.

<sup>257</sup> *Farham v. Pulliam*, 45 Tenn. (5 Cold.) 497.

<sup>258</sup> *Garrigue v. Keller*, 164 Ind. 676, 74 N. E. 523, 69 L. R. A. 870.

<sup>259</sup> *Frierson v. Williams*, 57 Miss. 451.

## CHANGE OF RELATION.

**68. The principal and surety, by subsequent dealings, can change their respective relations.**

It sometimes happens that the parties to a contract, by subsequent dealings, change their respective relations to each other, so that a surety may become a principal, a principal may become a surety, or they may occupy a dual relation; and the creditor, when he has knowledge of the change, should respect the new relation.<sup>260</sup> A simple illustration of this would be a promissory note signed by A. and B. jointly, but the money for which the note was given being paid by the creditor to A. In this case A. would be the principal, and B. the surety.<sup>261</sup> Suppose, before the note becomes due, A. should desire to repay the note, but the creditor refuses to receive payment. B., the surety, desiring the use of the money, A. pays it to B.; the latter agreeing to pay the note at maturity and relieve A. from all liability. B. then would become the principal, and A. the surety.<sup>262</sup> If B. were to receive from A. one-half only of the money, each would occupy the position of a principal for one half of the amount due, and surety for the other half.<sup>263</sup> If there were three joint makers of a note, it can be seen readily that the relation might be changed from surety to co-surety. So, a surety may become a supplemental surety.<sup>264</sup> Suppose the grantee of land assumes, as a part of the purchase price, a mortgage upon the land. As explained in a previous

<sup>260</sup> See post, § 103.<sup>261</sup> See ante, § 12.<sup>262</sup> *Coggeshall v. Ruggles*, 62 Ill. 401; *Chaplin v. Baker*, 124 Ind. 385, 24 N. E. 233; *Smith v. Steele*, 25 Vt. 427, 60 Am. Dec. 376; *Rhea v. Preston*, 75 Va. 757. *Vary v. Norton* (C. C.) 6 Fed. 808. The same result would follow where the surety purchases goods from the principal and assumes the debt as the price. *Williams v. Shelly*, 37 N. Y. 375.<sup>263</sup> One jointly liable with another might assume the entire indebtedness, and become a principal; the other becoming a surety. *Crafts v. Mott*, 4 N. Y. (4 Comst.) 604.<sup>264</sup> Where an indorsed note cannot be enforced against the maker, owing to failure of consideration, and the holder transfers it, the original creditor becomes the principal. *HAYS v. WARD*, 4 Johns Ch. (N. Y.) 123, 8 Am. Dec. 554.

section,<sup>305</sup> the grantee becomes the principal as to the indebtedness, and the grantor (mortgagor) a surety.<sup>306</sup> Suppose a further sale of the land be made; the second grantee likewise assuming the indebtedness. In this event the last grantee becomes the principal, the second grantor (first grantee) his surety, while the original grantor (mortgagor) becomes a surety for a surety, or a supplemental surety, liable for the default of the two grantees.<sup>307</sup> The parties, by any arrangement among themselves, cannot affect the existing rights of the creditor;<sup>308</sup> but he must be careful, in further dealing with the parties, lest he forfeit some of his rights.

*Test of Primary and Secondary Liability.*

After negotiations between persons have resulted in one or more of them occupying the position of sureties, or in changing previously existing relations, it is sometimes a little puzzling, at first glance, to decide which is the principal and which the surety. The test is, who is primarily liable? who is expected to discharge the obligation? and who, by discharging the obligation, frees the other from all liability without himself having the right to call on the others for reimbursement? If a person, in event of being compelled to discharge an obligation, has the right to call on some one else to indemnify him for his outlay—some one who should have discharged the obligation in the first instance—such person is a surety, and the latter, the person who can be required to indemnify, is the principal.<sup>309</sup>

<sup>305</sup> Ante, § 20.

<sup>306</sup> *Miller v. Thompson*, 34 Mich. 10. In some states the mortgagee can bring an action against the grantee to recover the mortgage debt, without any attempt to foreclose the mortgage or resorting to the mortgagor. *Lamb v. Tucker*, 42 Iowa, 118; *Schlatre v. Greaud*, 19 La. Ann. 125; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327. So, where a firm assumes the debt of a partner, the creditor can maintain an action against the firm. *Arnold v. Nichols*, 64 N. Y. 117.

<sup>307</sup> See *Stover v. Tompkins*, 34 Neb. 465, 51 N. W. 1040.

<sup>308</sup> *Hall v. Long*, 56 Ala. 493; *Conwell v. McCowan*, 81 Ill. 285; *Gillen v. Peters*, 39 Kan. 489, 18 Pac. 613; *Skinner v. Hill*, 32 Mo. App. 409; *Whittier v. Gould*, 8 Watts (Pa.) 485; *Shapleigh Hardware Co. v. Wells*, 90 Tex. 110, 37 S. W. 411, 59 Am. St. Rep. 783; *Buchanan v. Clark*, 10 Grat. (Va.) 164; *Shepherd v. May*, 115 U. S. 505, 6 Sup. Ct. 119, 29 L. Ed. 456.

<sup>309</sup> See ante, § 1.

**CHAPTER III.****THE STATUTE OF FRAUDS.**

- 69-72. Writing Required.**
- 73. Construction of Statute.**
- 74. Oral Contracts Not Void.**
- 75. Implied Promise of Principal Within Statute.**
- 76-86. Promises Not Within Statute.**
- 87-88. The Memorandum.**
- 89. Conflict of Laws.**
- 90. Pleading the Statute.**

**GENERAL REQUIREMENT OF WRITING.**

- 69. Under the statute of frauds, a contract of suretyship must be evidenced by writing to be enforceable.**

**EFFECT OF WRITING DETERMINES NECESSITY OF WRITING.**

- 70. The statute applies to contracts which are in substance to pay the debt of another, though not so in form.**

**PROMISES PARTLY WITHIN STATUTE.**

- 71. Where a promise is partly within and partly not within the statute, the part not within will be enforced if the contract be divisible.**

**STATUTE DOES NOT DISPENSE WITH CONSIDERATION.**

- 72. A consideration is not sufficient to take a promise out of the statute.**

At common law an oral contract of suretyship, like most other contracts, could be enforced against the party making it; but this led to the temptation, on the part of a creditor having a bad debt, to swear that some responsible third person had



promised to become a surety for that debt, and thus a dishonest creditor could collect his debt from an innocent third party who was in no wise concerned in the transaction.<sup>1</sup> This led to great abuses; and with a view to correcting the evil, and the "prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury," the English Parliament passed a statute (St. 29 Car. II, c. 3), commonly known as the "Statute of Frauds," which went into effect June 24, 1677. That part of the statute which concerns our subject is found in the fourth section, and reads as follows: "Noe Action shall be brought \* \* \* whereby to charge the Defendant upon any speciall promise to answere for the debt default or miscarriages of another person \* \* \* unlesse the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorized." This statute has been re-enacted in substance in most of the United States, and contracts of suretyship must be evidenced by writing.<sup>2</sup>

<sup>1</sup> "The reason of the statute is obvious; for in the one case, if there be any conflict between the parties as to the exact terms of the promise, the courts can see that justice is done by charging against the promisor the reasonable value of that in respect to which the promise was made, while in the other case, and when a third party is the real debtor, and the party alone receiving benefit, it is impossible to solve the conflict of memory or testimony in any manner certain to accomplish justice. There is also a temptation for a promisee, in a case where the real debtor has proved insolvent or unable to pay, to enlarge the scope of the promise, or to torture mere words of encouragement and confidence into an absolute promise; and it is so obviously just that a promisor receiving no benefit should be bound by the exact terms of his promise that this statute requiring a memorandum in writing was enacted." Brewer, J., in *DAVIS v. PATRICK*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826.

<sup>2</sup> *Bullard v. Johns*, 50 Ala. 382; *Wulff v. Lindsay* (Ariz.) 71 Pac. 963; *Harris v. Frank*, 81 Cal. 280, 22 Pac. 856; *Benson v. Walker*, 5 Har. (Del.) 110; *Johnson v. Morris*, 21 Ga. 238; *Denton v. Jackson*, 106 Ill. 433; *Catlett v. Sweetser*, 62 Ind. 365, 30 Am. Rep. 197; *Beerkle v. Edwards*, 55 Iowa, 750, 8 N. W. 341; *Smith v. Fah*, 15 B. Mon. (Ky.) 443; *Hogan v. Mississippi Valley Bank*, 28 La. Ann. 550; *White v. Solomonsky*, 30 Md. 535; *MANLEY v. GEAGAN*, 105 Mass. 445; *Goodman v. Felcher*, 116 Mich. 348, 74 N. W. 511; *Lom-*

A contract is said to be "within the statute" when it is one of those required by the statute to be evidenced in writing.

*Substance of Contract Governs Requirement as to Writing.*

In construing the statute of frauds, the courts are governed, not so much by the form of the contract, as by its substance.<sup>3</sup> For this reason an agreement to become a surety on a note,<sup>4</sup> or on a bond,<sup>5</sup> is as much within the statute as a contract of suretyship already made; but, where the promise is to procure some one else to sign a guaranty, the promise is not within the statute, the promise being that the creditor should have, not the promisor's, but a third person's, guaranty.<sup>6</sup> So, where a debtor of a person about to be sued by another promised that he would not pay without giving notice to the one about to bring suit, in order that the latter might have opportunity to

bard v. Martin, 39 Miss. 147; Nunn v. Carroll, 83 Mo. App. 135; Walker v. Richards, 39 N. H. 259; Dilts v. Parke, 4 N. J. Law, 219; Higley v. Bergholz, 44 App. Div. 638, 60 N. Y. Supp. 625; Russell v. Fenner, 21 Ohio Cir. Ct. R. 527, 11 O. C. D. 754; Hearing v. Dittman, 8 Phila. (Pa.) 307; Willoughby v. Florence, 51 S. C. 462, 29 S. E. 242; Flannery v. Childgey, 33 Tex. Civ. App. 638, 77 S. W. 1034; Steele v. Towne, 28 Vt. (2 Wms.) 771; First Nat. Bank v. Gaddis, 31 Wash. 596, 72 Pac. 460; HOOKER v. RUSSELL, 67 Wis. 257, 30 N. W. 358. See 23 Cent. Dig. col. 1851.

Written evidence is required, although the defendant admits in his pleadings, the making of the promise. Burt v. Wilson, 28 Cal. 632, 87 Am. Dec. 142; Hollingshead v. McKenzie, 8 Ga. 457; Taylor v. Allen, 40 Minn. 433, 42 N. W. 292; Thomas v. Churchill, 43 Neb. 266, 67 N. W. 182; Ashmore v. Evans, 11 N. J. Eq. 151; Holler v. Richards, 102 N. C. 545, 9 S. E. 460. See Stearns, Law of Suretyship, p. 53, note 74; and post, note 120.

<sup>3</sup> Scott v. Thomas, 2 Ill. 58; Stewart v. Campbell, 58 Me. 439, 4 Am. Rep. 296; Ames v. Foster, 106 Mass. 400, 8 Am. Rep. 343; Waldo v. Simonson, 18 Mich. 345; Duffy v. Wunsch, 42 N. Y. 243, 1 Am. Rep. 514; Hearing v. Dittman, 8 Phila. (Pa.) 307.

<sup>4</sup> Maker of note: Dee v. Downs, 57 Iowa, 589, 11 N. W. 2; Wilson v. Roberts, 5 Bosw. (N. Y.) 100. Acceptor: Chapline v. Atkinson, 45 Ark. 67, 55 Am. Rep. 531; Williams v. Caldwell, 4 S. C. 100. Indorser: Smith v. Easton, 54 Md. 138, 39 Am. Rep. 355; Wills v. Shinn, 42 N. J. Law, 138; Carville v. Crane, 5 Hill (N. Y.) 483, 40 Am. Dec. 364; Taylor v. Drake, 4 Strob. (S. C.) 431, 53 Am. Dec. 680. Guarantor: MALLETT v. BATEMAN, L. R. 1 C. P. 163.

<sup>5</sup> Hayes v. Burkam, 51 Ind. 130.

<sup>6</sup> BUSH<sup>ELL</sup> v. BEAVAN, 1 Bing. (N. C.) 103, 4 Moore & S. 622.

attach the debt, the promise is not within the statute.<sup>7</sup> An agreement by the creditor that the principal will give the surety a chattel mortgage is not within the statute.<sup>8</sup>

*Promises Partly Within Statute.*

Where a promise is partly within and partly not within the statute, no part of it can be enforced if the contract be entire; <sup>9</sup> but if the contract be divisible, and a portion of it, not within the statute, can be separated from that which is, the part not within the statute will be enforced.<sup>10</sup>

*Consideration Not Waived by Statute.*

There seems to be an impression among some that an oral contract can be enforced if there be a consideration, and that a contract evidenced in writing is enforceable, under the statute of frauds, although without consideration; but the statute of frauds is entirely independent of all other essential elements of a contract.<sup>11</sup> It is one of the elementary rules of law that every contract must be supported by a consideration,<sup>12</sup> else it is void; and a writing does not mend the matter, unless it be a sealed instrument.<sup>13</sup> On the other hand, an oral promise

<sup>7</sup> *TOWNE v. GROVER*, 9 Pick. (Mass.) 306.

<sup>8</sup> *Ressetter v. Waterman*, 151 Ill. 169, 37 N. E. 875, reversing *Waterman v. Ressetter*, 45 Ill. App. 155.

<sup>9</sup> *McMullen v. Riley*, 6 Gray (Mass.) 500; *Thayer v. Rock*, 13 Wend. (N. Y.) 53; *Dyer v. Graves*, 37 Vt. 369.

<sup>10</sup> *Rand v. Mather*, 11 Cush. (Mass.) 1, 59 Am. Dec. 131.

<sup>11</sup> "There can be no question under the statute of frauds in any case, until it is ascertained that there is a consideration to sustain the promise. Without that element, the agreement is void before we come to the statute. A naked promise is void on general principles of law, although it be in writing." Comstock, C. J., in *MALLORY v. GILLETT*, 21 N. Y. 412. The statute adds to the essentials of the contract, but does not take away any.

<sup>12</sup> See ante, c. II, note 124.

<sup>13</sup> *Eddy v. Roberts*, 17 Ill. 505; *Floyd v. Harrison*, 4 Bibb (Ky.) 76; *Richardson v. Robbins*, 124 Mass. 105; *DEXTER v. BLANCHARD*, 11 Allen (Mass.) 365; *Corkins v. Collins*, 16 Mich. 473; *Cowenhoven v. Howell*, 36 N. J. Law, 323; *PRIME v. KOEHLER*, 77 N. Y. 91; *Kelsey v. Hibbs*, 13 Ohio St. 340; *Bunneman v. Wagner*, 16 Or. 433, 18 Pac. 841, 8 Am. St. Rep. 306; *Maule v. Bucknell*, 50 Pa. 39; *Cross v. Richardson*, 30 Vt. 647; *Noyes' Ex'x v. Humphreys*, 11 Grat. (Va.) 636; *Bray v. Parcher*, 80 Wis. 16, 49 N. W. 111, 27 Am. St. Rep. 17.

to pay the debt of another cannot be enforced, although the surety actually has been paid to assume the liability, and orally admits that he entered into the contract. The statute is clear that the liability of the surety cannot be enforced unless the plaintiff can offer some evidence in writing. If the surety actually has received a benefit, it is his duty to make compensation if he refuse to perform his oral contract.

#### CONSTRUCTION OF STATUTE.

**73. The statute of frauds is construed strictly.**

#### ORAL CONTRACTS NOT VOID.

**74. Contracts within the statute of frauds are not invalid, but unenforceable merely.**

##### *Construction of Statute.*

The statute of frauds, being in derogation of the common law, receives a strict construction by the courts. The object of the statute was to prevent fraud, and the courts will not allow to it such a construction as will enable one to perpetrate a fraud. If the statute has been satisfied once by a writing, a new oral promise will be sufficient to take the case out of the statute of limitations.<sup>14</sup>

Where a person, in his character of attorney, enters into a contract which is not evidenced as required by the statute, the court may require him, as an officer of the court, to perform his contract. He is conscious of the law, and will not be allowed to take advantage of his own wrong.<sup>15</sup>

##### *Oral Contracts Not Invalid.*

It will be noticed, from the wording of the statute, that oral contracts of suretyship are not illegal nor void, but unenforceable only. This results from the expression, "No action shall be brought." The contract is perfectly valid, but the

<sup>14</sup> *Gibbons v. McCasland*, 1 Barn. & Ald. 690. This has been changed by statute in some states, requiring the new promise to be in writing.

<sup>15</sup> *In Re Greaves*, 1 Crompt. & J. 374, note.

statute takes away the remedy thereon; for the plaintiff is not allowed to offer oral evidence of the contract when he seeks to enforce it in court, the result being that, upon failure of evidence to support his action, the action fails.

While, in most cases, this distinction between being void and unenforceable is of little consequence, it is material in some; as a surety may waive his defense if he choose,<sup>16</sup> and hold his principal for the amount he has been compelled to pay.<sup>17</sup> This he could not do if the contract were void.<sup>18</sup> So a surety, who has paid the debt under the impression that it was enforceable against him, cannot recover from the creditor the amount paid, as he might do in the case of a void contract.

Again, an oral contract of suretyship, not being invalid, may be made the foundation of another contract. Thus a person who has entered into an oral contract of suretyship may stipulate with the creditor for his release by agreeing to perform some other act. The release by the creditor is a sufficient consideration for whatever new contract the surety has made, and he cannot refuse to perform the new contract, claiming want of consideration, although he could have pleaded the statute, had he been sued upon the original contract.

#### IMPLIED PROMISE OF PRINCIPAL.

**75. A promise to answer for liability arising out of a tort, or for an implied promise of the principal, is within the statute.**

The words "debt, default, or miscarriages" are very comprehensive, and include liability arising out of a tort which has been committed, as well as liability arising from a breach of contract.<sup>19</sup> Without determining the exact meaning to be given to each of the three words mentioned in the statute, the three together include every case in which a person can be made liable for another in a civil suit. Thus, an oral promise

<sup>16</sup> See post, § 90.

<sup>17</sup> See post, § 154.

<sup>18</sup> *Goddin v. Pierson*, 42 Ala. 370; *Ames v. Jackson*, 115 Mass. 512; *Lee v. Stowe*, 57 Tex. 444.

<sup>19</sup> *Turner v. Hubbell*, 2 Day (Conn.) 257, 2 Am. Dec. 115.

to pay for the damage caused by riding a horse without license, and causing his death, is not enforceable.<sup>20</sup>

While the liability of a surety must arise always from an express promise, a person may become surety for a liability of the principal which has arisen by implication.<sup>21</sup> Such is the case where the principal is liable in tort. So a promise that a bailee would redeliver the property is within the statute, as the bailee personally would be liable upon his implied promise to redeliver.<sup>22</sup>

#### **INVOLUNTARY SURETYSHIP NOT WITHIN STATUTE.**

**76. The statute of frauds does not apply where the relation of suretyship arises by operation of law.**

It would seem, to a person reading the statute for the first time, that the language was perfectly plain, and that there would be little difficulty in construing it; but it has been a very prolific source of litigation. Generally, the statute applies to collateral and not to original promises; and, while there are no exceptions to the statute, the difficulty is to determine which are collateral promises, and which are not—whether the defendant is liable only in case of the default of a third person, or whether he is the principal and primarily liable for his own obligation.<sup>23</sup>

It is clear that a surety who becomes such involuntarily is not within the statute, on account of the words "any special promise."

#### **PROMISES OF INDEMNITY.**

**77. In most, but not in all, jurisdictions a promise of indemnity is not within the statute. In a few jurisdictions it is not within the statute if the promise be made by one co-surety to another; otherwise, it is.**

<sup>20</sup> *KIRKHAM v. MARTER*, 2 Barn. & Ald. 613.

<sup>21</sup> *May v. Williams*, 61 Miss. 125, 48 Am. Rep. 80; *Whitcomb v. Kephart*, 50 Pa. 85.

<sup>22</sup> *BUCKMYR v. DARNALI*, 2 Ld. Raym. 1085, 5 Mod. 248, Salk. 27, 3 Salk. 15, Holt, 606.

<sup>23</sup> *Booth v. Elghmie*, 60 N. Y. 238, 19 Am. Rep. 171.

There is great conflict of authority whether a promise to indemnify one against loss if he will become surety for another is within the statute or not.<sup>24</sup> Thus, if A. promise B. that, if the latter will become surety for a debt owing by C. to D., A. will reimburse B. for any amount he may be compelled to pay by reason of such suretyship, must A.'s promise be evidenced in writing to be enforceable? Is it a collateral promise to pay another's debt? A large majority of the courts, including Massachusetts<sup>25</sup> and New York,<sup>26</sup> hold that such promise need not be evidenced in writing;<sup>27</sup> that the promise is made to the debtor to pay a prospective debt, which the latter may nev-

<sup>24</sup> Stearns, *Law of Suretyship*, p. 37.

<sup>25</sup> *Phelps v. Stone*, 172 Mass. 355, 52 N. E. 517; *Aldrich v. Ames*, 9 Gray (Mass.) 76; *Alger v. Scoville*, 1 Gray (Mass.) 391.

<sup>26</sup> *JONES v. BACON*, 145 N. Y. 446, 40 N. E. 216; *HARRISON v. SAWTEL*, 10 Johns. (N. Y.) 242, 6 Am. Dec. 337; *Chapin v. Merrill*, 4 Wend. (N. Y.) 657.

<sup>27</sup> *Jones v. Shorter*, 1 Ga. (1 Kelley) 294, 44 Am. Dec. 649; *Ressester v. Waterman*, 151 Ill. 169, 37 N. E. 875, reversing *Waterman v. Ressester*, 45 Ill. App. 155; *Keesling v. Frazier*, 119 Ind. 185, 21 N. E. 552; *Mills v. Brown*, 11 Iowa, 314; *Patton v. Mills*, 21 Kan. 163; *George v. Hoskins* (Ky.) 30 S. W. 406; *Hoggatt v. Thomas*, 35 La. Ann. 298; *Aldrich v. Ames*, 9 Gray (Mass.) 76; *Byers v. McClanahan*, 6 Gill & J. (Md.) 250; *Fidelity & Casualty Co. of New York v. Lawler*, 64 Minn. 144, 66 N. W. 143; *Minick v. Huff*, 41 Neb. 516, 59 N. W. 795; *Demeritt v. Bickford*, 58 N. H. 523; *Rose v. Wollenberg*, 31 Or. 269, 44 Pac. 382, 39 L. R. A. 378, 65 Am. St. Rep. 826; *Adams v. Flanagan*, 36 Vt. 400; *Vogel v. Melms*, 31 Wis. 306, 11 Am. Rep. 608; *Emerson v. Slater*, 22 How. (U. S.) 28, 16 L. Ed. 360; *WILDES v. DUDLOW*, L. R. 19 Eq. 198, criticising *GREEN v. CRESWELL*, 10 Adol. & E. 453, and approving *THOMAS v. COOK*, 8 Barn. & C. 728. An oral promise to indemnify a surety on a bail bond would be enforceable, as in that case there would be no implied indemnity from the principal. See post, § 159 (e); *Anderson v. Spence*, 72 Ind. 315, 37 Am. Rep. 162. Where the promise to indemnify is not collateral to any implied liability on the part of the principal, there is no question that it is not within the statute. Thus, if A. orally promise to indemnify B. if the latter will incur indebtedness to C., the promise is enforceable. *Lerch v. Gallup*, 67 Cal. 595, 8 Pac. 322; *Marcy v. Crawford*, 16 Conn. 549, 41 Am. Dec. 158; *Green v. Brookins*, 23 Mich. 48, 9 Am. Rep. 74; *Mallory v. Gillett*, 21 N. Y. 412; *Carville v. Crane*, 5 Hill (N. Y.) 433, 40 Am. Dec. 364; *Mays v. Joseph*, 34 Ohio St. 22; *Hull v. Brown*, 35 Wis. 652. A promise to indemnify a party against loss if he will commence or defend a suit is not within the statute. *Bullock v. Lloyd*, 2 Car. & P. 119. An oral promise that, if

er be required to pay, and is not made to the creditor.<sup>28</sup> Other courts regard the liability of the principal to reimburse his surety as the primary obligation,<sup>29</sup> and the promise of indemnity by a third party as collateral thereto, and hence within the statute.<sup>30</sup> A few of the latter courts except from this rule promises of indemnity made by one co-surety to another,<sup>31</sup> holding that they are not within the statute, as each co-surety is liable for the full amount of the debt,<sup>32</sup> and his promise to indemnify his co-surety amounts to a promise to pay his own debt.

In contracts of indemnity, it is not the use of the word "indemnity" which determines whether the contract is or is not within the statute. A promise to indemnify a person if he will sell goods to another is equivalent to a promise to guaranty payment, and must be in writing to be enforceable.

#### DEL CREDERE AGENCIES.

##### **78. The contract of a del credere agent is not within the statute.**

A del credere agent is one who, in consideration of an increase of commission, engages absolutely to pay his principal

another will sign a note, the promisor will pay it, is enforceable. *Godden v. Pierson*, 42 Ala. 370.

<sup>28</sup> See post, § 82.

<sup>29</sup> See post, § 153.

<sup>30</sup> *May v. Williams*, 61 Miss. 125, 48 Am. Rep. 80; *Hurt v. Ford*, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823; *Apgar's Adm'rs v. Hiller*, 24 N. J. Law, 812; *Draughan v. Bunting*, 31 N. C. (9 Ired.) 10; *Easter v. White*, 12 Ohio St. 219; *Nugent v. Wolfe*, 111 Pa. 471, 4 Atl. 15, 56 Am. Rep. 291; *Simpson v. Nance*, 1 Speers (S. C.) 4; *Macey v. Childress*, 2 Tenn. Ch. 438.

<sup>31</sup> *HARTLEY v. SANFORD*, 66 N. J. Law, 627, 50 Atl. 454, 55 L. R. A. 206; *Ferrell v. Maxwell*, 28 Ohio St. 383, 22 Am. Rep. 393; *Mickley v. Stocksleger*, 10 Pa. Co. Ct. R. 345. An oral agreement among co-sureties, affecting their rights and liabilities as to contribution, is not covered by the statute. *Baldwin v. Fleming*, 90 Ind. 177; *Mansfield v. Edwards*, 136 Mass. 15, 49 Am. Rep. 1; *Barry v. Ransom*, 12 N. Y. 462; *Ferrell v. Maxwell*, 28 Ohio St. 383, 22 Am. Rep. 393; *Guild v. Conrad*, L. R. 2 Q. B. D. 885. See post, § 163.

<sup>32</sup> See post, § 95.



the price of the goods which he sells for him.<sup>33</sup> His contract is not within the statute of frauds,<sup>34</sup> being primarily a contract of insurance; and an oral contract of insurance is enforceable.<sup>35</sup> He insures the solvency and punctuality of those to whom he will sell on credit. His contract is made in furtherance of his own interests; and, although he becomes responsible for any goods sold on credit, he becomes so incidentally, it not being the chief object of his contract. His contract is not made with reference to any particular debtors, nor any particular indebtedness.

#### FRAUDULENT ASSERTIONS AS TO CREDIT.

**79. False and deceitful representations as to the financial standing and responsibility of third persons are not within the statute.**

A person who is guilty of deceitful representations as to the financial responsibility of a third person cannot take refuge behind the statute of frauds when he is sought to be held liable for his deceit.<sup>36</sup> This cannot be said to be a "special promise." Where a person fraudulently asserted that another was a person to be safely trusted and given credit, he was held

<sup>33</sup> *National Cordage Co. v. Sims*, 44 Neb. 148, 62 N. W. 514.

<sup>34</sup> *Swan v. Nesmith*, 7 Pick. (Mass.) 220, 19 Am. Dec. 282; *D. M. Osborne & Co. v. Baker*, 34 Minn. 307, 25 N. W. 606, 57 Am. Rep. 55; *Suman v. Inman*, 6 Mo. App. 384; *Bullowa v. Orgo*, 57 N. J. Eq. 428, 41 Atl. 494; *WOLFF v. KOPPEL*, 5 Hill (N. Y.) 458; *Sherwood v. Stone*, 14 N. Y. 267; *Guggenheim v. Rosenfeld*, 68 Tenn. (9 Baxt.) 533; *Bradley v. Richardson*, 23 Vt. 720, Fed. Cas. No. 1,786; *Thompson v. Perkins*, 3 Mason (U. S.) 232, Fed. Cas. No. 13,972; *Couturier v. Hastie*, 8 Exch. 40. For a similar reason a promise by a person to pay one-half of the losses sustained by reason of clients introduced by him to a firm is not within the statute. *SUTTON v. GREY*, 69 Law T. 354, affirmed [1894] 1 Q. B. 285.

<sup>35</sup> *Croft v. Insurance Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902; *Franklin Fire Ins. Co. v. Colt*, 20 Wall. (U. S.) 560, 22 L. Ed. 423.

<sup>36</sup> *Hart v. Tallmadge*, 2 Day (Conn.) 331, 2 Am. Dec. 105; *Warren v. Barker*, 2 Duv. (Ky.) 155; *Patten v. Gurney*, 17 Mass. 182, 9 Am. Dec. 141; *Allen v. Addington*, 7 Wend. (N. Y.) 9; *Ewins v. Calhoun*, 7 Vt. 79; *Russell v. Clark*, 7 Cranch (U. S.) 69, 3 L. Ed. 271.

liable upon his assertion, although oral,<sup>87</sup> and although accompanied by a willingness to guaranty.<sup>88</sup> In such cases the plaintiff does not consider him as a debtor, and is not seeking to hold him upon a debt which he promised to pay, but for damages arising from the deceit practiced directly by him.

### NO PRINCIPAL.

**80. The statute does not apply where there is no one who can be held liable as principal. This may arise—**

- (a) **Where there was originally no liability on the part of the person for whom the promise was made.**
- (b) **Where the promise results in the extinguishment of the debt against the person originally liable.**

### VOIDABLE CONTRACTS OF PRINCIPAL.

**81. In some, but not in all, states the statute applies, although the principal may not be liable on account of his contract being voidable.**

The words "of another," in the statute, indicate that it is intended to apply to cases where there is an actual primary liability of the principal to the promisee—that a promise, to be within the statute, must be collateral to another promise. Where there is no liability on the part of any one at the time the promise is made, or no action will lie against the party undertaken for, it is clear that the promise is original, and not collateral.<sup>89</sup> Thus, where there was an oral promise to pay

<sup>87</sup> *Upton v. Vall*, 6 Johns. (N. Y.) 181, 5 Am. Dec. 210.

<sup>88</sup> *Hamar v. Alexander*, 5 Bos. & P. 241.

<sup>89</sup> *Downey v. Hinchman*, 25 Ind. 453; *Smith v. Mayo*, 1 Allen (Mass.) 160; *Tighe v. Morrison*, 116 N. Y. 263, 22 N. E. 164, 5 L. R. A. 617. The fact that the person for whom the services were rendered has been determined judicially not to be legally liable will not be sufficient to show that a promise to pay therefor was original, if the promisor was not a party to the suit. *HOOKER v. RUSSELL*, 67 Wis. 257, 30 N. W. 358. Where a person was sued for assault and battery, and an oral promise was made to pay if the suit were withdrawn, which was done, it was held that the promise was original. The defendant was not a debtor at the time the promise was made. There might have been a verdict in his favor. The promisor wanted

for goods furnished gratuitously to another, it can be enforced.<sup>40</sup> So, where one person undertook to charge the estate of a deceased person for goods bought, thinking the estate liable therefor, and promising to pay for the goods if the estate did not, it was held that, there being no liability on the part of the estate, the promise was not within the statute.<sup>41</sup>

A promise that another will perform, that other not being bound to the promisee, is not within the statute. Thus, a promise that another will deliver stock to the promisee, there being no contract between such other person and the promisee to deliver such stock, is not a collateral promise.<sup>42</sup>

*Promise Extinguishing Debt.*

Sometimes the promise results in the extinguishment of the original debt, leaving no one who can be said to be primarily liable. In such cases the statute does not apply.<sup>43</sup> Novation by the substitution of parties is a common instance of this. Suppose A. owes B. \$10, and B. owes C. a like sum, and all three, meeting together, orally agree that A. shall pay C. \$10, and that B.'s right against A. and liability to C. shall be terminated and discharged. Such an agreement could be enforced, and C. could hold A. on his promise to pay; for, after the discharge of B. from liability, A. cannot say he has promised to pay the debt of another, although, indirectly, it has that effect. He has promised merely to pay his own debt in a particular

the withdrawal of the suit, and promised to pay therefor. *READ v. NASH*, 1 Wils. 305.

<sup>40</sup> *Loomis v. Newhall*, 15 Pick. (Mass.) 159.

<sup>41</sup> *MEASE v. WAGNER*, 1 McCord (S. C.) 395.

<sup>42</sup> *HARGREAVES v. PARSONS*, 13 Mees. & W. 561. For the same reason, an oral promise to the purchaser of corporate stock that the stock would pay 15 per cent. dividends is enforceable; there being no liability on the part of the corporation to pay such dividends. *Moorehouse v. Crangle*, 36 Ohio St. 130, 38 Am. Rep. 564.

<sup>43</sup> *Thornton v. Gulce*, 73 Ala. 321; *Packer v. Benton*, 35 Conn. 343, 95 Am. Dec. 246; *Howell v. Field*, 70 Ga. 592; *Day v. Cloe*, 4 Bush (Ky.) 563; *Andre v. Bodman*, 13 Md. 241, 71 Am. Dec. 628; *Curtis v. Brown*, 5 Cush. (Mass.) 488; *Yale v. Edgerton*, 14 Minn. 194 (Gil. 21), 100 Am. Dec. 190; *Meriden Britannia Co. v. Zlinsen*, 48 N. Y. 247, 8 Am. Rep. 549; *Allshouse v. Ramsay*, 6 Whart. (Pa.) 311, 37 Am. Dec. 417; *Arnold v. Stedman*, 45 Pa. 186; *Wallace v. Freeman*, 25 Tex. Sup. 91; *Watson v. Jacobs*, 29 Vt. 169; *GOODMAN v. CHASE*, 1 Barn. & Ald. 297; *Bird v. Gammon*, 3 Bing. N. C. 883.

way.<sup>44</sup> So, where a father was indebted to his son, and a third person, in consideration of a release of the father from the debt, orally promised to pay it, and the release was granted, the promise was not within the statute, for, after the release, there was no one liable for the debt except the promisor; hence, no collateral liability.<sup>45</sup> The same rule applies where the creditor releases his debtor in consideration of the debt being assumed by such debtor jointly with another. The person becoming so jointly bound cannot claim to be collaterally liable.<sup>46</sup>

*Voidable Contracts of Principal.*

There is conflict whether a promise to pay the debt of a person who was not legally competent to contract is within the statute. In some courts it is held that such a promise is collateral, and, if oral, is not enforceable. Hence a promise to answer for a debt incurred by an infant is within the statute. The infant's contract is valid until avoided by him, and it can be avoided by him only. The test is not that the principal could have a defense.<sup>47</sup> Other courts hold that the person un-

<sup>44</sup> *Carlisle v. Campbell*, 76 Ala. 247; *Welch v. Kenny*, 49 Cal. 49; *Buchanan v. Moran*, 62 Conn. 83, 25 Atl. 396; *Karr v. Porter*, 4 Houst. (Del.) 297; *Sapp v. Faircloth*, 70 Ga. 690; *Casey v. Miller*, 3 Idaho, 567, 32 Pac. 195; *Runde v. Runde*, 59 Ill. 98; *Hardy v. Blazer*, 29 Ind. 226, 92 Am. Dec. 347; *Lester v. Bowman*, 39 Iowa, 611; *Day v. Cloe*, 4 Bush (Ky.) 563; *Dearborn v. Parks*, 5 Greenl. (Me.) 81, 17 Am. Dec. 206; *Webster v. Le Compte*, 74 Md. 249, 22 Atl. 232; *Eden v. Chaffee*, 160 Mass. 225, 35 N. E. 675; *Mulcrone v. American Co.*, 55 Mich. 622, 22 N. W. 67; *Yale v. Edgerton*, 14 Minn. 194 (Gil. 144); *Wilson v. Vass*, 54 Mo. App. 221; *Booth v. Elghmie*, 60 N. Y. 238, 19 Am. Rep. 171; *Estabrook v. Gebhart*, 32 Ohio St. 415; *Miller v. Lynch*, 17 Or. 61, 19 Pac. 845; *Hearing v. Dittman*, 8 Phila. (Pa.) 307; *Corbett v. Cochran*, 3 Hill (S. C.) 41, 30 Am. Dec. 348; *McCreary v. Van Hook*, 35 Tex. 631; *Bates v. Sabin*, 64 Vt. 511, 24 Atl. 1013; *Rietzloff v. Glover*, 91 Wis. 65, 64 N. W. 298. Where there is a novation of creditors, the debtor remaining the same, the promise of the latter to pay the new creditor is clearly not within the statute. *Aultman & Co. v. Fletcher*, 110 Ala. 452, 18 South. 215; *Gallaghre v. Nichols*, 60 N. Y. 438.

<sup>45</sup> *Wood v. Corcoran*, 1 Allen (Mass.) 405.

<sup>46</sup> *Ex parte Lane*, 1 De Gex, 300.

<sup>47</sup> *DEXTER v. BLANCHARD*, 11 Allen (Mass.) 365; *Scott v. Bryan*, 73 N. C. 582; *Brown v. Farmers' Bank*, 38 Tex. 265, 31 S. W. 235, 33 L. R. A. 359.

der disability is not liable, and that a promise to answer for his debt is not collateral, and hence not within the statute.<sup>48</sup> This must not be confused with a promise by a parent to pay for articles which it is his duty to provide for his children, but to cases only where there is some debt for which the promisor would not be liable aside from his promise, and which the principal debtor could avoid on the ground of infancy, insanity, coverture, or other disability.<sup>49</sup>

#### PROMISE TO PAY OUT OF DEBTOR'S PROPERTY.

**82. The statute does not apply where the promise is to pay out of the debtor's own property.**

If the debtor has placed his property in the hands of a third person for the purpose of having it applied upon the debtor's indebtedness, or if a third person has property of the debtor which the latter authorizes to be applied toward his debt, and such third person thereupon orally promise the creditor to pay such debt, the promise is enforceable; for the promisor is not undertaking himself to pay the debt of another, but is acting merely as the agent of the debtor in distributing the property, and his promise is, in effect, the promise of his principal.<sup>50</sup> To be within the statute, a promise to pay the debt of

<sup>48</sup> King v. Summitt, 73 Ind. 312, 38 Am. Rep. 145; Roche v. Chaplin, 1 Bailey (S. C.) 419.

<sup>49</sup> See post, § 130, as to liability of surety on a contract voidable as to the principal.

<sup>50</sup> Cameron v. Clarke, 11 Ala. 259; Hughes v. Lawson, 31 Ark. 613; McLaren v. Hutchinson, 22 Cal. 187, 83 Am. Dec. 59; Hamill v. Hall, 4 Colo. App. 290, 35 Pac. 927; Consociated Presbyterian Society of Green's Farm v. Staples, 23 Conn. 544; Ledbetter v. McGhees, 84 Ga. 227, 10 S. E. 727; Prather v. Vineyard, 9 Ill. 40; Bott v. Barr, 95 Ind. 243; Todd v. Tobey, 29 Me. 219; Loomis v. Newhall, 15 Pick. (Mass.) 159; Mitts v. McMorran, 64 Mich. 664, 31 N. W. 521; Huyler's Ex'rs v. Atwood, 26 N. J. Eq. 504; FIRST NAT. BANK OF SING SING v. CHALMERS, 144 N. Y. 432, 39 N. E. 331; Mason v. Wilson, 84 N. C. 51, 37 Am. Rep. 612; DOCK v. BOYD, 93 Pa. 92; Townsend v. Long, 77 Pa. 143, 18 Am. Rep. 438; Peck v. Goff, 18 R. I. 94, 25 Atl. 690; Fullam v. Adams, 37 Vt. 391; Goddard v. Mockbee, 5 Cranch, C. C. (U. S.) 666, Fed. Cas. No. 5,493; WILLIAMS v. LEPPER, 3 Bur. 1886. The same rule applies where a person takes the assets of a partner-

another must be such a promise that, if enforced, the promisor himself will suffer a loss. The mere fact, however, that the promisor has property of the debtor in his possession, will not take the promise out of the statute, if the promisor has no authority to apply such property upon the debt.<sup>51</sup> To come within the above rule, the promisor must hold the property free from conditions, and it must be immediately available to apply on the indebtedness. Thus, where the arrangement is to pay after conversion of the property into cash, an oral promise made prior to such conversion is not enforceable.<sup>52</sup>

Other reasons offered for holding that a promise by one holding the debtor's property to pay the debt is not within the statute are that the promisor, by taking the property, has become the principal, and that he has become a trustee, and cannot take advantage of the statute to justify a breach of his trust.

As the drawee of a bill of exchange is presumed to have funds of the drawer in his possession, his oral acceptance is enforceable.<sup>53</sup>

ship, agreeing to pay the firm debts. *Provenchee v. Piper*, 68 N. H. 31, 36 Atl. 552. Where a person agrees to pay board for workmen, and has the money for that purpose, an oral contract suffices. *Chicago & W. Coal Co. v. Liddell*, 69 Ill. 639.

<sup>51</sup> *Hughes v. Lawson*, 31 Ark. 613; *Dilts v. Parke*, 4 N. J. Law, 219; *State Bank at New Brunswick v. Mettler*, 2 Bosw. (N. Y.) 392; *Simpson v. Nance*, 1 Speers (S. C.) 4; *Murphy v. Renkert*, 12 Helsk. (Tenn.) 397.

<sup>52</sup> *BELKNAP v. BENDER*, 75 N. Y. 446, 31 Am. Rep. 476.

<sup>53</sup> *Espalla v. Wilson*, 86 Ala. 487, 5 South. 867; *JARVIS v. WILSON*, 46 Conn. 90, 33 Am. Rep. 18; *Nelson v. First Nat. Bank*, 48 Ill. 36, 95 Am. Dec. 510; *Louisville, E. & St. L. Ry. Co. v. Caldwell*, 98 Ind. 245; *Grant v. Shaw*, 16 Mass. 341, 8 Am. Dec. 142; *McCutchen v. Rice*, 56 Miss. 455; *Lavell v. Frost*, 16 Mont. 93, 40 Pac. 146; *Leonard v. Mason*, 1 Wend. (N. Y.) 522; *Dull v. Bricker*, 76 Pa. 255; *Strohecker v. Cohen*, 1 Speers (S. C.) 349; *Neumann v. Shroeder*, 71 Tex. 81, 8 S. W. 632; *Goddard's Estate*, 66 Vt. 415, 29 Atl. 634; *Shields v. Middleton*, 2 Cranch, C. C. (U. S.) 205, Fed. Cas. No. 12,786.

**PROMISE TO DEBTOR.**

**83. The statute does not apply where the promise is made to the debtor, instead of to the creditor.**

Where the promise that the debt will be paid is made to the principal debtor himself, it is not within the statute, for the reason that it is not a promise to answer for the debt of another. In the sense in which these words are used in the statute, the promise must be made to the creditor.<sup>54</sup> When one for a consideration orally promises the maker of a note that he will pay it, he cannot set up the statute as a defense for failure to carry out his promise. If the oral promise had been made to the holder of the note, it would be different.

**PROMISOR ACQUIRING A BENEFIT.**

**84. The statute does not apply where the chief object of the promise is that the promisor may and does acquire a benefit, or obtain something that he himself wants, although, incidentally, payment by the promisor would result in the payment of another's debt.**

Frequently negotiations between parties result in one of them orally promising to pay another's debt; but the statute of frauds does not apply necessarily to such cases. The object of the statute is to protect the promisor, where his chief intention is to become liable for the debt of another; but,

<sup>54</sup> Tuttle v. Armstead, 53 Conn. 175, 22 Atl. 677; North v. Robinson, 1 Duv. (Ky.) 71; Harwood v. Jones, 10 Gill & J. (Md.) 404, 32 Am. Dec. 130; Hubon v. Pank, 116 Mass. 541; ALGER v. SCOVILLE, 1 Gray (Mass.) 391; Pratt v. Bates, 40 Mich. 37; Goetz v. Foos, 14 Minn. 265 (Gil. 196), 100 Am. Dec. 218; Brown, to Use of Clardy, v. Brown, 47 Mo. 130, 4 Am. Rep. 320; Fiske v. McGregory, 34 N. H. 414; Tighe v. Morrison, 116 N. Y. 263, 22 N. E. 164, 5 L. R. A. 617; Rice v. Carter's Adm'r, 33 N. C. 298; Shook v. Vanmater, 22 Wis. 532; EASTWOOD v. KENYON, 11 Adol. & E. 438, 39 E. C. L. 245. A promise to one who is neither the debtor nor the creditor is not within the statute; as a promise to a bailiff that, if he would not arrest the principal, the promisor would pay. Reader v. Kingham, 13 C. B. (N. S.) 344.

where the chief object of the promisor is to obtain a benefit for himself, ~~he~~ cannot free himself from liability because his contract results incidentally in a promise to pay another's debt.<sup>55</sup>

This rule was applied where a person orally agreed to take an assignment at a discount of claims held by the creditors of an insolvent debtor. The object of the promise was the purchase of these claims, and not to become collaterally liable for them.<sup>56</sup> So, where a person orally promised to pay the storage charges upon merchandise if the warehouseman would waive his lien therefor, the promisor being about to buy the merchandise, and the object of his promise being to obtain immediate possession, the promise was enforceable.<sup>57</sup> An oral promise to pay a debt for which the debtor was imprisoned is enforceable, where the object of the promisor was to enable the debtor to return to his service.<sup>58</sup>

An oral promise by a mortgagee, whose mortgage is subject to a prior lien, to pay the debt secured by the lien if the lien holder will not enforce the same, is not within the statute. The object of the promisor is to improve his own security.<sup>59</sup> Where a person who had entered into a contract to buy ore from a mining company, and who was also a creditor of the company, orally promised to see to the payment of one who was engaged in transporting the ore from the mine for delivery to the buyer,

<sup>55</sup> *Clay v. Walton*, 9 Cal. 328; *Rhodes v. Matthews*, 67 Ind. 131; *Patton v. Mills*, 21 Kan. 163; *Ames v. Foster*, 100 Mass. 400, 8 Am. Rep. 343; *ALGER v. SCOVILLE*, 1 Gray, 391; *Calkins v. Chandler*, 36 Mich. 324, 24 Am. Rep. 593; *Garner v. Hudgins*, 46 Mo. 399, 2 Am. Rep. 520; *Wills v. Cutler*, 61 N. H. 405; *Raabe v. Squier*, 148 N. Y. 81, 42 N. E. 516; *Muller v. Riviere*, 59 Tex. 640, 46 Am. Rep. 291; *Greene v. Burton*, 59 Vt. 423, 10 Atl. 575; *DAVIS v. PATRICK*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 828; *SUTTON v. GREY* [1894] 1 Q. B. D. 285. Zeal in the cause of temperance, and interest in enforcing the laws, is not such a benefit to the promisor as to make his promise to pay for a prosecution for selling intoxicating liquor an original one. *HOOKE v. RUSSELL*, 67 Wls. 257, 30 N. W. 358.

<sup>56</sup> *ANSTEY v. MARDEN*, 1 Bos. & P. (N. R.) 124; *Hardy v. Blazer*, 29 Ind. 226, 92 Am. Dec. 347; *Hearing v. Dittman*, 8 Phila. (Pa.) 307.

<sup>57</sup> *Williamson v. Rexroat*, 55 Ill. App. 116.

<sup>58</sup> *Berg v. Spitz*, 87 App. Div. 602, 84 N. Y. Supp. 532.

<sup>59</sup> *Berkshire v. Young*, 45 Ind. 461; *Bluthenthal v. Moore*, 106 Ga. 424, 32 S. E. 344; *Power v. Rankin*, 114 Ill. 52, 29 N. E. 185; *Fears v. Story*, 131 Mass. 47; *PRIME v. KOEHLER*, 77 N. Y. 91.



the promise was held not to be within the statute; for, unless the mine was worked successfully, the promisor would be able to obtain neither the ore nor the repayment of his loan, and the chief object of his promise was to prevent the stoppage of work.<sup>60</sup>

It is not requisite that the benefit be something of pecuniary value to the promisor. It is sufficient if the chief object of the promise is to accomplish a result which he desires. Thus an oral promise to make good any deficiency in an estate if the promisor be joined as administrator is enforceable.<sup>61</sup>

It must not be supposed, however, that in every case where it can be shown that the surety has received a benefit the statute of frauds does not apply. The statute applies if the chief object of the promise be to secure another's debt, although the surety may benefit by credit being extended to the principal. It is very common for a surety to receive compensation for the risk he undertakes, but this does not prevent the application of the statute. Again, a surety without compensation may benefit indirectly from the contract. Where the benefit to be derived is merely an inducement to enter into the contract, it is not sufficient. There must be a beneficial participation in the main contract. It is not sufficient that the creditor has relinquished an advantage in consequence of the promise, if the advantage so relinquished has not inured to the benefit of the promisor.<sup>62</sup>

<sup>60</sup> DAVIS v. PATRICK, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826. A large stockholder in a railway company was also a large creditor of the corporation, and was to be paid out of the proceeds of the road. A contractor, who had been employed by the company to build bridges along the line, not receiving payments as agreed, refused to go on with the work. The stockholder orally promised to become security, and it was held that his promise was enforceable, as his chief object was to promote his own interests. There could be no proceeds, and hence no payment by the company to the stockholder as creditor, until the bridges were completed. Emerson v. Slater, 22 How. (U. S.) 28, 16 L. Ed. 360; RAABE v. SQUIER, 148 N. Y. 81, 42 N. E. 516.

<sup>61</sup> TOMLINSON v. GILL, Amb. 330.

<sup>62</sup> AMES v. FOSTER, 106 Mass. 400, 8 Am. Rep. 843; DEXTER v. BLANCHARD, 11 Allen (Mass.) 365; Curtis v. Brown, 5 Cush. (Mass.) 488; MALLORY v. GILLET, 21 N. Y. 412.

**PROMISE TO PAY PROMISOR'S OWN INDEBTEDNESS.**

85. The statute does not apply where the effect of the promise is to pay the promisor's own debt.

*Assuming Indebtedness.*

The statute does not apply to an oral promise which is in effect to pay the promisor's own debt, although such promise incidentally is to pay the debt of another. This includes cases of the purchase of property, real or personal, where the buyer, as a part of the purchase price, assumes a mortgage thereon.<sup>63</sup> While the result of his promise is to pay the debt of the mortgagor, its chief object is the payment of his own debt in a particular way; that is, instead of promising to pay the unpaid portion of the purchase price to the seller, he promises to pay it to another—the mortgagee. It can make no difference to him whom he pays, so long as he is liable for the debt. The rule is the same, although the indebtedness assumed is unsecured by a mortgage,<sup>64</sup> or is the general indebtedness of the seller, and not connected with the article bought.<sup>65</sup>

*Guarantying Note Transferred in Payment.*

Another class of cases which falls under this head is where a debtor, instead of paying cash, delivers the note of a third person, and orally guaranties payment. The debtor was and is liable for the debt until paid, and his guaranty of a third person's note is a promise to pay his own debt.<sup>66</sup> The rule is otherwise if the note be taken by the transferee as absolute, and not as conditional, payment.<sup>67</sup>

<sup>63</sup> *Provenchee v. Piper*, 63 N. H. 31, 30 Atl. 552; *Huyler's Ex'rs v. Atwood*, 26 N. J. Eq. 504; *Ruhling v. Hackett*, 1 Nev. 360.

<sup>64</sup> *BARKER v. BUCKLIN*, 2 Denio (N. Y.) 45, 43 Am. Dec. 726.

<sup>65</sup> *Wilson v. Bevens*, 58 Ill. 232.

<sup>66</sup> *Mobile & G. R. Co. v. Jones*, 57 Ga. 198; *Darst v. Bates*, 95 Ill. 493; *Little v. Edwards*, 69 Md. 499, 16 Atl. 134; *Thomas v. Dodge*, 8 Mich. 51; *Crane v. Wheeler*, 48 Minn. 207, 50 N. W. 1033; *Barker v. Scudder*, 56 Mo. 272; *Milks v. Rich*, 80 N. Y. 269, 36 Am. Rep. 615; *CARDELL v. McNIEL*, 21 N. Y. 336; *BROWN v. CURTISS*, 2 N. Y. 225; *Rowland v. Borke*, 49 N. C. 337; *Malone v. Keener*, 44 Pa. 107;

<sup>67</sup> *DOWS v. SWETT*, 134 Mass. 140, 45 Am. Rep. 310.

*Promise by One Joint Debtor.*

Another class of cases falling under this rule is an oral promise by one jointly liable to pay the entire debt. Where two or more are jointly liable for a debt, as is the case with partners,<sup>68</sup> each is severally liable to the creditor for the entire debt, although, as between themselves, they may be liable proportionately only; hence, when one of the joint debtors promises the creditor to pay the entire debt, he is promising to do only what the law would compel him to do, and the statute has no application.<sup>69</sup>

Where the creditor deals with two or more persons jointly, they are jointly liable to him, although, as between themselves, one may be a principal and the other a surety.<sup>70</sup> In these cases a promise by the one who is in fact a surety to pay the entire debt is enforceable, coming under the above rule.<sup>71</sup>

**DIRECT AND ORIGINAL PROMISES.**

**86. An oral promise is enforceable, if it be direct and original, though, as between the promisor and another, the relation of principal and surety exists; but it is not enforceable if the promise be collateral, and the promisee recognizes some person other than the promisor as being primarily liable, although the promisee relies solely on the promisor.**

A creditor can not be required to respect the rights of a surety, if he is not aware that the person with whom he deals occupies that relation.<sup>72</sup> Under such circumstances there is no surety, so far as the creditor is concerned, and an oral

*Hopkins v. Richardson*, 9 Grat. (Va.) 485; *Eagle M. & R. Mach. Co. v. Shattuck*, 53 Wis. 455, 10 N. W. 690, 40 Am. Rep. 780.

<sup>68</sup> *George, Partnership*, p. 249.

<sup>69</sup> *Filles v. McLeod*, 14 Ala. 611; *Weatherly v. Hardman*, 68 Ga. 592; *Hopkins v. Carr*, 31 Ind. 260; *GIBBS v. BLANCHARD*, 15 Mich. 292; *Rice v. Barry*, 2 Cranch, C. C. (U. S.) 592, Fed. Cas. No. 11,751.

<sup>70</sup> *Boyce v. Murphy*, 91 Ind. 1, 46 Am. Rep. 567; *Stone v. Walker*, 13 Gray (Mass.) 613; *Rottman v. Fix*, 25 Mo. App. 571; *Hetfield v. Dow*, 27 N. J. Law, 440; *Ex parte Williams*, 4 Yerg. (Tenn.) 579; *Wainwright v. Straw*, 15 Vt. 215, 40 Am. Dec. 675.

<sup>71</sup> *GIBBS v. BLANCHARD*, 15 Mich. 292.

<sup>72</sup> See post, § 102.

promise would be enforceable. The rule is the same, though the creditor may suspect that the promisor is undertaking to become responsible for another; and knowledge of the relation between two persons does not require the creditor to respect it during the original negotiations, if he does not choose to do so. Two men might enter a store, and one offer to guaranty the price of goods to be sold to the other. The storekeeper might say to the offerer: "I do not choose to sell goods in this way; but I am willing to sell to you, on credit, whatever you may desire." If the offerer agrees to this arrangement, and promises to pay for the goods, it is a direct and original promise upon his part; and he cannot escape liability by saying that the storekeeper knew that the goods were for the other. The intention is clear, in this case, that there was no intention on the part of the storekeeper to accept any collateral liability; but he extended credit to the promisor alone. It is, in effect, a sale to one who, in turn, sells to the other.

Other cases are not so clear, and the courts must ascertain, from the surrounding circumstances, the intention of the parties. It is clear that if two men enter a store, and one says to the storekeeper, "Let this man have what goods he wants, and, if he does not pay for them, I will," the intention of the promisor is to assume a collateral liability only; for he plainly indicates an expectation that the other will pay, and that he himself will be called upon only in event of the failure of the other to do so. In such cases, an oral promise cannot be enforced;<sup>78</sup> nor can the storekeeper, by any uncommunicated

<sup>78</sup> Webb v. Hawkins Co., 101 Ala. 630, 14 South. 407; Harris v. Frank, 81 Cal. 280, 22 Pac. 856; Ruggles v. Gatton, 50 Ill. 412; Lance v. Pearce, 101 Ind. 595, 1 N. E. 184; Walker v. Irwin, 94 Iowa, 448, 62 N. W. 785; Moses v. Norton, 36 Me. 113, 58 Am. Dec. 738; Norris v. Graham, 33 Md. 56; Bugbee v. Kendrick, 130 Mass. 437; Hagadorn v. Stronach Co., 81 Mich. 56, 45 N. W. 650; WELCH v. MARVIN, 36 Mich. 59; Maurin v. Fogelberg, 37 Minn. 23, 32 N. W. 858, 5 Am. St. Rep. 814; Gill v. Reed, 55 Mo. App. 246; Walker v. Richards, 39 N. H. 259; Cowdin v. Gottgetreu, 55 N. Y. 650; Birchell v. Neaster, 86 Ohio St. 331; Blxby v. Church, 28 Or. 242, 42 Pac. 613; Lewis v. Lewis Lumber Co., 156 Pa. 217, 27 Atl. 20; Matthews v. Milton, 4 Yerg. (Tenn.) 576, 26 Am. Dec. 247; Mead v. Watson, 57 Vt. 426; Ware v. Stephenson, 10 Leigh (Va.) 155; West v. O'Hara, 55 Wis. 645, 13 N. W. 894; JONES v. COOPER, Cowp. 227. A collateral promise is not

mental intention on his part to look to the promisor only, affect the liability of the latter. If, however, the speaker says, "Let this man have what goods he wants, and I will pay you," it is a direct and original promise; and, though oral, is enforceable.<sup>74</sup> The other man might be the servant of the promisor; and, if there were no circumstances tending to indicate the contrary, the storekeeper would be justified in supposing that delivery to the other was delivery to the promisor, and could hold the latter, although the promisor may not have meant what he said. There is an intermediate form of expression which is equivocal, and which requires additional facts to enable the courts to determine whether the promise is original or collateral, and that intermediate form is, "Let this man have what goods he wants, and I will see you paid." Does the speaker mean that he will see the storekeeper paid by the other man, or by the promisor himself? If the former, the promise is collateral, and, if oral, not enforceable;<sup>75</sup> while, in the latter case, it is direct and enforceable.<sup>76</sup> Cases of this kind require evidence of surrounding circumstances to discover the intention of the parties;<sup>77</sup> but, when the intention is ascertained,

taken out of the statute of frauds because made after the original obligation. *MALLORY v. GILLETT*, 21 N. Y. 412.

<sup>74</sup> *Faires v. Lodanc*, 10 Ala. 50; *BALDWIN v. HIERS*, 73 Ga. 739; *Williams v. Corbet*, 28 Ill. 262; *Miller v. Nelhaus*, 51 Ind. 401; *Backus v. Clark*, 1 Kan. 303, 83 Am. Dec. 437; *Bugbee v. Kendrick*, 130 Mass. 437; *MORRIS v. OSTERHOUT*, 55 Mich. 262, 21 N. W. 339; *Wood v. Patch*, 11 R. I. 445; *Eddy v. Davidson*, 42 Vt. 56. Where the promisor said, "I will be responsible," this was held to be original and enforceable. *Chase v. Day*, 17 Johns. (N. Y.) 114. In *Ueberroth v. Riegel*, 71 Pa. 280, the writer of the following order was held liable as a principal, and not as a guarantor: "Please give the bearer, H. F., the goods which he will select, not exceeding over \$550, on my account."

<sup>75</sup> *MANLEY v. GEAGAN*, 105 Mass. 445; *Randl v. Krohne*, 31 Pa. Super. Ct. 130; *WATKINS v. PERKINS*, 1 Ld. Raym. 224.

<sup>76</sup> *BALDWIN v. HIERS*, 73 Ga. 739; *Hartley v. Varner*, 88 Ill. 561; *Grant v. Wolf*, 34 Minn. 32, 24 N. W. 289; *LAKEMAN v. MOUNT-STEPHEN*, L. R. 7 Eng. & Ir. App. 17; *DAVIS v. PATRICK*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826.

<sup>77</sup> In *Keate v. Temple*, 1 Bos. & P. (N. R.) 158, a lieutenant in the navy requested a tailor to supply the crew of the ship with clothing, and said: "I will see you paid at the pay table." The court regarded the promise as collateral, for the amount was too large for the prom-

it is easy to determine whether the promise is within the statute or not.

The intention of the parties is a question of fact for the jury; and not only the language employed, but all the surrounding circumstances bearing upon the question, should be considered.<sup>78</sup>

*Building Contracts.*

The question frequently arises in the case of building contracts, where the contractor fails to pay workmen and materialmen. If the owner says to the workmen, "Go on, and I will pay you," the promise is original, the object being to promote the interests of the promisor;<sup>79</sup> but if he says, "Go on, and, if the contractor does not pay you, I will," the promise is collateral, and, being oral, is not enforceable.

*Giving Credit to the Promisor.*

It is said, frequently, that a promise is original if the creditor has given credit to the promisor. This is true, if the expression "giving credit" is used in the sense that it was the intention of the parties, as the result of their conversation and acts, that the promisor should assume the liability of a principal, and not that of a surety. It does not mean, where the intention is clear that the promisor intended to incur collateral liability only, that the creditor could change that liability by charging the promisor upon his books, and making no charge against the principal.<sup>80</sup> The creditor cannot manufacture evidence for himself in that manner. Nor does it make any differ-

isor to undertake personally, and the tailor must have relied upon the power of the lieutenant to stop the money out of the sailors' pay.

<sup>78</sup> *Blank v. Dreher*, 25 Ill. 331; *Elder v. Warfield*, 7 Har. & J. (Md.) 391; *DAVIS v. PATRICK*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826. Where the promisor promised to pay the creditor if the latter would lend money to his son, it was considered to be a collateral promise from the form of expression used. It might have been otherwise, had the request been to pay the money to the son. *BUTCHER v. ANDREWS*, *Comob.* 473.

<sup>79</sup> *Clifford v. Luhring*, 69 Ill. 401; *Hall v. Alford*, 105 Ky. 664, 49 S. W. 444; *Block v. Galitzka*, 114 App. Div. 799, 100 N. Y. Supp. 173. An oral promise to pay materialmen is enforceable as to material thereafter furnished, but not as to that already furnished. *Owen v. Stevens*, 78 Ill. 462.

<sup>80</sup> *Cowdin v. Gottgetreu*, 55 N. Y. 650.

ence that the creditor has relied solely upon the promisor.<sup>81</sup> If the creditor has made a charge upon his books against the principal, it is prima facie evidence that the creditor recognized the collateral liability of the promisor.<sup>82</sup>

#### THE MEMORANDUM—REQUIREMENTS.

87. The memorandum required by the statute of frauds need not be formal; but it must contain all of the terms of the contract, and be signed by the party to be charged, or by his agent.

If it was the intention of the parties to embody their contract of suretyship in a written instrument, and to regard such instrument as the contract, the rules which apply to written instruments would govern;<sup>83</sup> but it will be noticed that the statute of frauds does not require a written contract, but provides merely for a written memorandum or note of an oral contract, which, in the absence of a formal written contract, would be sufficient. The form of this memorandum is wholly immaterial, if it substantially shows the transaction.<sup>84</sup> The minutes of a corporate meeting would be sufficient.<sup>85</sup> It need not be contained on one sheet of paper, but several letters or

<sup>81</sup> BUCKMYR v. DARNALL, 2 Ld. Raym. 1085, 5 Mod. 248, Salk. 27, 3 Salk. 15, Holt, 606.

<sup>82</sup> Hardman v. Bradley, 85 Ill. 162; MEAD v. WATSON, 57 Vt. 426. It is, however, not conclusive. Swift v. Pierce, 13 Allen (Mass.) 136. The fact that the creditor makes out a bill to the principal is strong evidence that the promisor is collaterally liable. Larson v. Wyman, 14 Wend. (N. Y.) 246. So, where the promisee sues the one for whom services were rendered. HOOKER v. RUSSELL, 67 Wis. 257, 30 N. W. 358.

<sup>83</sup> See ante, § 46.

<sup>84</sup> Barlickman v. Kuykendall, 6 Blackf. (Ind.) 21; Ellis v. Deadman, 4 Bibb (Ky.) 466; Barney v. Patterson, 6 Har. & J. (Md.) 182; Lerner v. Wannemacher, 9 Allen (Mass.) 412; EVANSVILLE NAT. BANK v. KAUFMANN, 93 N. Y. 273, 45 Am. Rep. 204; Elfe v. Gadsden, 2 Rich. Law (S. C.) 373; Nichol v. Ridley, 5 Yerg. (Tenn.) 63, 26 Am. Dec. 254. The memorandum may be written with ink or pencil, or it may be printed or stamped. Vielle v. Osgood, 8 Barb. (N. Y.) 130; Draper v. Pattina, 2 Speers (S. C.) 292.

<sup>85</sup> Tufts v. Plymouth Co., 14 Allen (Mass.) 407; Chase v. Lowell, 7 Gray (Mass.) 33.

telegrams may be taken together to make a complete agreement;<sup>88</sup> but it is well settled that, where the agreement is made from more than one paper, unless they all are signed,<sup>87</sup> they must refer to each other specifically,<sup>88</sup> and oral evidence will not be allowed to connect them.<sup>89</sup>

While the memorandum is not required to be formal, it must contain all of the terms of the contract,<sup>90</sup> as oral evidence will not be allowed to supply any that are missing.<sup>91</sup> Even a formal contract will not be sufficient, if any terms must be supplied by oral evidence.<sup>92</sup>

The memorandum must indicate the party who has the right to enforce the liability; otherwise, it might fall into the hands of some one for whom the promisor never intended it.<sup>93</sup> The mere fact that a name appears is not sufficient.<sup>94</sup>

The subject-matter of the contract must appear, at least in general terms.<sup>95</sup> If the parties have used abbreviations, or

<sup>86</sup> *Jones v. Post*, 6 Cal. 102; *Lerned v. Wannemacher*, 9 Allen (Mass.) 412; *Wilson Sewing-Mach. Co. v. Schnell*, 20 Minn. 40 (Gil. 33); *Simons v. Steele*, 36 N. H. 73; *Tallman v. Franklin*, 14 N. Y. 584; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446, 14 L. Ed. 493.

<sup>87</sup> *Work v. Cowhick*, 81 Ill. 317; *Peck v. Vandemark*, 99 N. Y. 29, 1 N. E. 41; *Thayer v. Luce*, 22 Ohio St. 62; *Ide v. Stanton*, 15 Vt. 685, 40 Am. Dec. 698; *Beckwith v. Talbot*, 95 U. S. 289, 24 L. Ed. 496.

<sup>88</sup> *Wright v. Weeks*, 25 N. Y. 153.

<sup>89</sup> *Adams v. McMillan*, 7 Port. (Ala.) 73; *Nichols v. Johnson*, 10 Conn. 192; *Washington Ice Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462; *Boardman v. Spooner*, 13 Allen (Mass.) 353, 90 Am. Dec. 196; *Scarlett v. Stein*, 40 Md. 512; *Wiley v. Robert*, 27 Mo. 388; *Abeel v. Radcliff*, 13 Johns. (N. Y.) 297, 7 Am. Dec. 377; *Blair v. Snodgrass*, 1 Sneed (Tenn.) 1; *Ide v. Stanton*, 15 Vt. 685, 40 Am. Dec. 698; *Williams v. Morris*, 95 U. S. 456, 24 L. Ed. 360.

<sup>90</sup> *Brodie v. St. Paul*, 1 Ves. Jr. 326. If the agreement be vague and indefinite, it cannot be said to be in writing. *Wright v. Weeks*, 25 N. Y. 153.

<sup>91</sup> *Ridgway v. Ingram*, 50 Ind. 145, 19 Am. Rep. 708; *Stearns v. Hall*, 9 Cush. (Mass.) 31; *Hall v. Soule*, 11 Mich. 494; *Bailey v. Ogden*, 3 Johns. (N. Y.) 399, 3 Am. Dec. 509; *Bryan v. Hunt*, 4 Sneed (Tenn.) 543, 70 Am. Dec. 262; *Ide v. Stanton*, 15 Vt. 685, 40 Am. Dec. 698.

<sup>92</sup> *Calkins v. Falk*, 38 How. Prac. (N. Y.) 62.

<sup>93</sup> *Williams v. Lake*, 2 El. & El. 349.

<sup>94</sup> *Bailey v. Ogden*, 3 Johns. (N. Y.) 399, 3 Am. Dec. 509.

<sup>95</sup> *Nichols v. Johnson*, 10 Conn. 198; *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671; *Hall v. Soule*, 11 Mich. 494; *Sale v. Darragh*, 2 Hilt. (N. Y.) 184.



technical or ambiguous terms,<sup>96</sup> oral evidence may be introduced to show the meaning they have acquired by custom and usage, but not to show the sense in which the parties have used them.<sup>97</sup>

*Consideration.*

There has been considerable conflict upon the question whether the memorandum should express the consideration for the promise. This results from a doubt whether the word "agreement" in the statute is to be taken in its popular or in its technical sense. In the latter case a consideration is necessary,<sup>98</sup> and must be shown.<sup>99</sup>

The courts which hold that a consideration must be expressed do not require that it be expressed precisely, but regard it sufficient if it appear by implication. If a guaranty be written upon the principal contract, it is presumed to have been made at the same time;<sup>100</sup> and, if the latter show a consideration,

<sup>96</sup> *UNION BANK OF LOUISIANA v. COSTER*, 3 N. Y. 203, 53 Am. Dec. 280.

<sup>97</sup> *Wright v. Weeks*, 25 N. Y. 153; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446, 14 L. Ed. 493.

<sup>98</sup> See ante, § 49.

<sup>99</sup> *Weldin v. Porter*, 4 Houst. (Del.) 236; *Hargroves v. Cooke*, 15 Ga. 321; *Emerson v. Aultman*, 69 Md. 125, 14 Atl. 671; *Jones v. Palmer*, 1 Doug. (Mich.) 379; *Underwood v. Campbell*, 14 N. H. 393; *Laing v. Lee*, 20 N. J. Law (Spencer) 337; *Drake v. Seaman*, 97 N. Y. 234; *Perry v. Spikes*, 49 Wis. 384, 5 N. W. 794, 35 Am. Rep. 782; *WOOD v. BENSON*, 2 Crompt. & J. 94. In the following states, the consideration need not be shown: Connecticut: *Sage v. Wilcox*, 6 Conn. 81. Maine: *Gillighan v. Boardman*, 29 Me. 79. Missouri: *Little v. Nabb*, 10 Mo. 3. North Carolina: *Ashford v. Robinson*, 30 N. C. 114. Ohio: *Reed v. Evans*, 17 Ohio, 128. Vermont: *Gregory v. Gleed*, 33 Vt. 405. In some states the consideration need not be shown, because the statute enacted in those states uses the word "promise," instead of "agreement," and a promise may be made without a consideration. *Ellison v. Jackson*, 12 Cal. 542; *Dorman v. Bigelow*, 1 Fla. 231; *Ratliff v. Trout*, 6 J. J. Marsh. (Ky.) 605; *Wren v. Pearce*, 4 Smedes & M. (Miss.) 91; *Campbell v. Findley*, 3 Humph. (Tenn.) 330; *Ellett v. Britton*, 10 Tex. 208; *Colgin v. Henley*, 6 Leigh (Va.) 85. In Alabama the statute requires that the agreement express the consideration, while in Illinois and Indiana the statute waives that requirement. See, as to this subject, *Stearns, Law of Suretyship*, p. 30.

<sup>100</sup> *UNION BANK OF LOUISIANA v. COSTER*, 3 N. Y. 203, 53 Am. Dec. 280.

it is sufficient.<sup>101</sup> If the writing be under seal, a consideration need not be mentioned.<sup>102</sup> The words "for value received" are likewise sufficient.<sup>103</sup> "I guaranty the payment of any goods which S. delivers to N." sufficiently shows that the consideration was the delivery of the goods.<sup>104</sup>

Where the words are ambiguous, and might refer to a past as well as to an executory consideration, oral evidence of the situation of the parties at the time the contract was made is allowed, in order to arrive at an interpretation of their language.<sup>105</sup> Thus, where the words were, "I hereby guaranty B.'s account," and it was shown orally that there was a pre-existing account to which the words could apply, the guaranty was void for want of consideration.<sup>106</sup>

#### *Signature.*

The statute requires the memorandum to be signed by the party to be charged,<sup>107</sup> or by some person authorized by him, but does not require the signature of both parties.<sup>108</sup> Hence a formal written contract would not be a compliance with the statute, if the signature of the promisor be lacking.

The courts are very liberal in this, as in most of the require-

<sup>101</sup> *Jones v. Kuhn*, 34 Kan. 414, 8 Pac. 777; *Nabb v. Koontz*, 17 Md. 283.

<sup>102</sup> *Douglass v. Howland*, 24 Wend. (N. Y.) 35. See ante, § 49.

<sup>103</sup> *Martin v. Hazard Powder Co.*, 2 Colo. 506; *Whitney v. Stearns*, 16 Me. 394; *D. M. Osborne & Co. v. Baker*, 34 Minn. 307, 25 N. W. 606, 57 Am. Rep. 55; *Miller v. Cook*, 23 N. Y. 495; *Woodward v. Pickett*, Dud. (S. C.) 30; *Lapham v. Barrett*, 1 Vt. 247; *Dahlman v. Hammel*, 45 Wis. 466.

<sup>104</sup> *Stadt v. Lill*, 9 East, 348.

<sup>105</sup> *Walrath v. Thompson*, 4 Hill (N. Y.) 200.

<sup>106</sup> *Allnut v. Ashenden*, 5 Man. & G. 392.

<sup>107</sup> A signature is necessary, though the memorandum is written by the party to be charged. *Balley v. Ogden*, 3 Johns. (N. Y.) 399, 3 Am. Dec. 500; *Anderson v. Harold*, 10 Ohio, 399; *Barry v. Law*, 1 Cranch, C. C. 77, 89 Fed. 582. The statute does not require a seal. *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Farris v. Martin*, 10 Humph. (Tenn.) 495.

<sup>108</sup> *Nichols v. Johnson*, 10 Conn. 192; *Farwell v. Lowther*, 18 Ill. 252; *Shirley v. Shirley*, 7 Blackf. (Ind.) 452; *Barstow v. Gray*, 3 Greenl. (Me.) 400; *Penniman v. Hartshorn*, 13 Mass. 87; *Morin v. Martz*, 13 Minn. 191 (Gil. 180); *Webster v. Ela*, 5 N. H. 540; *Clason v. Balley*, 14 Johns. (N. Y.) 484; *Douglass v. Spears*, 2 Nott & McC. 207, 10 Am. Dec. 538; *Sheld v. Stamps*, 2 Sneed (Tenn.) 172.

ments of the statute, and the signature may be made by initials<sup>109</sup> or by mark.<sup>110</sup> It may be printed, if affixed by authority, or such printed signature has been adopted.<sup>111</sup> It is not necessary that the signature appear at the end of the memorandum, but it may appear in any part, if it was placed there to authenticate the instrument.<sup>112</sup>

#### *Agency.*

Generally, any one who can act as agent for any purpose can act as an agent for the purpose of affixing the signature required by the statute.<sup>113</sup> One person can act as agent for each of the parties,<sup>114</sup> but neither can act as agent for the other.<sup>115</sup>

Authority to the agent may be given in the same manner as in other cases of agency; and an unauthorized act may be ratified afterwards.<sup>116</sup> Written authority is not necessary,<sup>117</sup>

<sup>109</sup> *Sanborn v. Flagler*, 9 Allen (Mass.) 474; *Dykers v. Townsend*, 24 N. Y. 57; *Phillips v. Hooker*, 62 N. C. 193; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446, 14 L. Ed. 493.

<sup>110</sup> *Morris v. Kniffin*, 37 Barb. (N. Y.) 336.

<sup>111</sup> *Lerned v. Wannemacher*, 9 Allen (Mass.) 412; *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343; *Merritt v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286. But, if the statute uses the word "subscribed," a printed signature would not be sufficient. *Vielie v. Osgood*, 8 Barb. (N. Y.) 130.

<sup>112</sup> *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 661; *Wise v. Ray*, 8 G. Greene (Iowa) 430; *Penniman v. Hartshorn*, 13 Mass. 87; *Hawkins v. Chace*, 19 Pick. (Mass.) 502; *Clason v. Bailey*, 14 Johns. (N. Y.) 484. Where the signature is not at the end, it is for the jury to decide whether the party intended to be bound by it, or whether he refused to complete the instrument. *Johnson v. Dodgson*, 2 Mees. & W. 653.

<sup>113</sup> *Ennis v. Waller*, 3 Blackf. (Ind.) 472; *Brent v. Green*, 6 Leigh (Va.) 16; *Bird v. Boulter*, 4 Barn. & Adol. 443.

<sup>114</sup> *Adams v. McMillan*, 7 Port. (Ala.) 73; *Cleaves v. Foss*, 4 Greenl. (Me.) 1; *Singstack's Ex'rs v. Harding*, 4 Har. & J. 186, 7 Am. Dec. 669; *Morton v. Dean*, 13 Metc. (Mass.) 385; *Endicott v. Penny*, 14 Smedes & M. (Miss.) 144; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659; *Gordon v. Saunders*, 2 McCord, Eq. (S. C.) 151; *Smith v. Jones*, 7 Leigh (Va.) 165, 30 Am. Dec. 498.

<sup>115</sup> *Robinson v. Garth*, 6 Ala. 204, 41 Am. Dec. 47; *Boardman v. Spooner*, 13 Allen, 353, 90 Am. Dec. 196.

<sup>116</sup> *Holland v. Hoyt*, 14 Mich. 238. In Kentucky ratification must be in writing. *Riggan v. Crain*, 86 Ky. 249, 5 S. W. 561.

<sup>117</sup> *Rutenberg v. Main*, 47 Cal. 213; *Johnson v. Dodge*, 17 Ill. 433;

except that authority to execute a sealed instrument must be also under seal.<sup>118</sup> The statute is sufficiently complied with if the agent sign his own name.<sup>119</sup>

*Delivery.*

While a written contract, which is regarded by the parties as being the contract itself, is not valid until delivered,<sup>120</sup> the statute of frauds does not require a delivery of the memorandum, which is evidence of an oral contract only. As soon as a sufficient memorandum has been made, the statute is complied with, whatever may become of the memorandum afterwards.

**MEMORANDUM—TIME OF MAKING.**

**88. The memorandum may be made at any time before suit is brought.**

As the memorandum provided for by the statute of frauds is not the contract itself, but written evidence only of an oral contract, it is sufficient if such writing be made at any time prior to bringing suit.<sup>121</sup> A subsequent recognition of the contract by letter would meet the requirement of the statute.

Coleman v. Balley, 4 Bibb (Ky.) 297; Alna, Inhabitants of, v. Plummer, 4 Greenl. (Me.) 258; Ulen v. Kittredge, 7 Mass. 233; Johnson v. McGruder, 15 Mo. 365; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; McWhorter v. McMahan, 10 Palge (N. Y.) 386; Yerby v. Grigsby, 9 Leigh (Va.) 337; Conaway v. Sweeney, 24 W. Va. 643. Contra, Bullard v. Johns, 50 Ala. 382.

<sup>118</sup> Blood v. Hardy, 15 Me. 61.

<sup>119</sup> McConnell v. Brillhart, 17 Ill. 354, 65 Am. Dec. 661; Williams v. Woods, 16 Md. 220; Williams v. Bacon, 2 Gray (Mass.) 387; Curtis v. Blair, 26 Miss. 309, 59 Am. Dec. 257; Dykers v. Townsend, 24 N. Y. 57; Phillips v. Hooker, 62 N. C. 193; Yerby v. Grigsby, 9 Leigh (Va.) 337; Salmon Falls Mfg. Co. v. Goddard, 14 How. (U. S.) 447, 14 L. Ed. 493.

<sup>120</sup> See ante, § 41.

<sup>121</sup> Williams v. Bacon, 2 Gray (Mass.) 237; Webster v. Zielly, 52 Barb. (N. Y.) 482; Ellbert v. Finkbeiner, 68 Pa. 243, 8 Am. Rep. 176.

**CONFLICT OF LAWS.**

89. Where the statute of frauds prevails, courts will not enforce an oral contract of suretyship, although such contract would be enforceable in the state where made.

**PLEADING.**

90. If a surety desire to avail himself of the defense of the statute of frauds, he must plead it.

*Lex Fori.*

The statute of frauds is remedial. It does not make the contract void,<sup>123</sup> but governs the evidence admissible to prove such a contract. Hence an oral contract of suretyship, made in a state where the statute of frauds has not been re-enacted, and enforceable there, could not be enforced if suit be brought in a state where the statute is in force. The courts of the latter state would apply the law governing the admission of evidence therein, and would refuse to receive oral evidence of a contract of suretyship.<sup>123</sup> To do otherwise would be to let in all of the evils the statute was designed to remedy.

*Waiver of Defense.*

A surety may waive his defense under the statute. It is not requisite that the plaintiff's declaration or petition should show that a contract of suretyship was in writing.<sup>124</sup> It suffices if an agreement be shown, as it will be presumed to be valid and enforceable until the contrary be proved. The statute of frauds has not altered the rules of pleading, but only

<sup>123</sup> See ante, § 74.

<sup>123</sup> Downer v. Chesebrough, 36 Conn. 39, 4 Am. Rep. 29; Bird v. Munroe, 66 Me. 337, 22 Am. Rep. 571; Emery v. Burbank, 163 Mass. 326, 39 N. E. 1026, 28 L. R. A. 57, 47 Am. St. Rep. 456; Heaton v. Eldridge, 56 Ohio St. 101, 46 N. E. 638, 36 L. R. A. 817, 60 Am. St. Rep. 737.

<sup>124</sup> Porter v. Drennan, 13 Ill. App. 362; Ecker v. McAllister, 45 Md. 290; Walker v. Richards, 39 N. H. 259; Marston v. Sweet, 66 N. Y. 207, 23 Am. Rep. 43; Macey v. Childress, 2 Tenn. Ch. 438; Lilley v. Hewitt, 11 Price, 494.

the proof required.<sup>125</sup> If the defendant does not plead the statute, he cannot obtain the benefit of it.<sup>126</sup> If the declaration or bill, however, affirmatively shows an oral contract, the defendant may demur.<sup>127</sup>

<sup>125</sup> *Dexter v. Ohlander*, 89 Ala. 262, 7 South. 115; *Barnard v. Lloyd*, 85 Cal. 131, 24 Pac. 658; *Hancock v. Council*, 96 Ga. 778, 22 S. E. 335; *Speyer v. Desjardins*, 144 Ill. 641, 32 N. E. 283, 36 Am. St. Rep. 478; *Ecker v. Bohn*, 45 Md. 278; *Mullaly v. Holden*, 123 Mass. 583; *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270; *Hinchman v. Rutan*, 31 N. J. Law, 496; *Marston v. Swett*, 66 N. Y. 206, 23 Am. Rep. 43; *Shields v. Titus*, 46 Ohio St. 528, 22 N. E. 717. In a few states the rule has been changed by statute. *Waymire v. Waymire*, 141 Ind. 164, 40 N. E. 523; *Burden v. Knight*, 82 Iowa, 584, 48 N. W. 985.

<sup>126</sup> *Guynn v. McCauley*, 32 Ark. 97; *Osborne v. Endicott*, 6 Cal. 149, 65 Am. Dec. 498; *Beard v. Converse*, 84 Ill. 515; *Wiseman v. Thompson*, 94 Iowa, 607, 63 N. W. 346; *Douglass v. Snow*, 77 Me. 91; *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 968; *Wells v. Monihan*, 129 N. Y. 161, 29 N. E. 232; *Lyon v. Crissman*, 22 N. C. 268. The defendant cannot set up his defense by requesting a special finding. *Porter v. Wormser*, 94 N. Y. 431. The defendant is entitled to the benefit of the statute, although he admits the contract in his pleadings. *Burt v. Wilson*, 28 Cal. 632, 87 Am. Dec. 142; *Hollingshead v. McKenzie*, 8 Ga. 457; *Taylor v. Allen*, 40 Minn. 433, 42 N. W. 292; *Thomas v. Churchill*, 48 Neb. 268, 67 N. W. 182; *Ashmore v. Evans*, 11 N. J. Eq. 151; *Holler v. Richards*, 102 N. C. 545, 9 S. E. 460.

<sup>127</sup> *Linn Boyd Tobacco Warehouse Co. v. Terill*, 76 Ky. 463; *Howard v. Brower*, 37 Ohio St. 402; *Macey v. Childress*, 2 Tenn. Ch. 438; *Randall v. Howard*, 2 Black (U. S.) 585, 17 L. Ed. 269. See *Stearns, Law of Suretyship*, p. 52.

## CHAPTER IV.

## CONSTRUCTION OF THE CONTRACT.

- 91. Rules.
- 92-93. What Constitutes a Guaranty.
- 94. Conflict of Laws.

## RULES.

91. A contract of suretyship is construed like any other contract; and its construction is governed by the following rules:
- (a) Oral evidence is not admissible to alter the contract; but it will be reformed by a court of equity, if it do not express the real intention of the parties.
  - (b) Words are to be given their ordinary meaning.
  - (c) The agreement should receive that construction which best will effectuate the intention of the parties.
  - (d) The intention is to be collected from the surrounding circumstances, and from the whole instrument.
  - (e) If the contract be susceptible of two meanings, it will be given the meaning which will render it valid.
  - (f) Words will be construed more strictly against the party using them.
  - (g) Weight will be given to the construction placed upon the contract by the parties.
  - (h) Express terms will prevail over those implied by law.
  - (i) Where the contract is given under a particular statute or by-law, it will be construed with reference to that statute or by-law.
  - (j) In case of doubt, a surety will be favored.

*Reasonable Construction.*

So much has been said about a surety being a favorite of the law that it seems to be an impression, in some cases, that all ambiguities in the contract are to be interpreted in his favor; and some even seem to think that he is never to be held liable unless it be impossible to discover any loophole whereby he can escape liability. However, the general rule in interpreting a contract of suretyship is that it is to receive

the liberal interpretation accorded to any other contract.<sup>1</sup> It must not be forgotten that the creditor frequently parts with his money, relying entirely upon the financial responsibility of the surety, and that guaranties generally are drawn hurriedly and informally by the guarantor himself; and if, by the selection of his language, he has not made his intention perfectly clear to a person of the average intelligence, he should not be allowed to escape because of ambiguities for which he alone is responsible. A strict, rigid, and technical construction would interfere seriously with the business of the world.<sup>2</sup> On the other hand, the promisee should not be allowed to insist upon an extreme and unreasonable interpretation in his favor.

A contract should not be construed so as to give all of the benefits to one party and all of the burdens to the other, although the parties are at liberty, to a great extent, to shift benefits and burdens by express agreement. The construction of the contract is a matter of law for the court.<sup>3</sup>

<sup>1</sup> *London & S. F. Bank v. Parrott*, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64; *White v. Reed*, 15 Conn. 457; *United States v. Maloney*, 4 App. D. C. 505; *Peoria Savings, Loan & Trust Co. v. Elder*, 165 Ill. 55, 45 N. E. 1083; *Irwin v. Kilburn*, 104 Ind. 113, 3 N. E. 650; *Shickle, Harrison & Howard Iron Co. v. Water Works Co.*, 83 Iowa, 396, 49 N. W. 987; *Lowe v. Beckwith*, 14 B. Mon. (Ky.) 184, 58 Am. Dec. 659; *Gillighan v. Boardman*, 29 Me. (16 Shep.) 79; *Hooper v. Hooper*, 81 Md. 155, 31 Atl. 508, 48 Am. St. Rep. 496; *Mussey v. Rayner*, 22 Pick. (Mass.) 223; *Mathews v. Phelps*, 61 Mich. 327, 28 N. W. 108, 1 Am. St. Rep. 581; *Shine's Adm'r v. Central Sav. Bank*, 70 Mo. 524; *Simons v. Steele*, 36 N. H. 73; *Ulster County Sav. Inst. v. Young*, 161 N. Y. 23, 55 N. E. 483; *SMITH v. MOLLESON*, 148 N. Y. 241, 42 N. E. 609; *PEOPLE v. BACKUS*, 117 N. Y. 196, 22 N. E. 759; *EVANSVILLE NAT. BANK v. KAUFMANN*, 93 N. Y. 273, 45 Am. Rep. 204; *UNION BANK OF LOUISIANA v. COSTER*, 3 N. Y. (3 Comst.) 203, 53 Am. Dec. 280; *Birdsall v. Heacock*, 32 Ohio St. 177, 30 Am. Rep. 572; *Roth v. Miller*, 15 Serg. & R. (Pa.) 100; *Gardner v. Watson*, 76 Tex. 25, 13 S. W. 39; *Noyes v. Nichols*, 28 Vt. 159; *Moore v. Holt*, 10 Grat. (Va.) 284; *DAVIS v. WELLS*, 104 U. S. 164, 26 L. Ed. 686; *United States Fidelity & Guaranty Co. v. Com'rs of Woodson County*, 145 Fed. 144, 76 C. C. A. 114. See, generally, as to interpretation of contracts, *Clark, Contracts* (2d Ed.) c. X.

<sup>2</sup> *DAVIS v. WELLS*, 104 U. S. 159, 26 L. Ed. 686; *Lawrence v. McCalmont*, 2 How. (U. S.) 426, 11 L. Ed. 326.

<sup>3</sup> *Bell v. Bruen*, 1 How. (U. S.) 169, 17 Pet. 161, 11 L. Ed. 89.



*Corporate Suretyship.*

The construction should be reasonable, and should not be affected by the fact that the surety receives compensation as an inducement to enter into the contract, or that the making of such contracts is a matter of business. While it is true that a contract of suretyship, entered into by a corporation formed for that very purpose, receives a somewhat different construction from that of a private surety, this results from the fact that the corporate surety itself prepares the contract with great care, looking entirely to its own interests, thus bringing in rules of construction which would not enter into a contract signed by a private surety, who frequently signs a contract prepared by the creditor or obligee, and sometimes without even reading it.<sup>4</sup>

*Varying by Oral Evidence.*

The purpose and intent for which the contract was executed must be deduced from the writing itself,<sup>5</sup> and oral evidence will not be allowed to contradict it.<sup>6</sup> A guaranty which is clearly one of payment cannot be changed into one of collection, by proof of an understanding of the parties at the time of delivery.<sup>7</sup> Where a bond, given to secure the performance of a contract to deliver brick, stated the amount as 1,000 brick, proof is inadmissible to show that 100,000 was intended.<sup>8</sup>

Oral proof is admissible to aid the court in case the language be ambiguous.<sup>9</sup>

*Reformation of Contract.*

Where the contract does not express the intention of the parties, a court of equity will reform the instrument to conform to such intention, as well against the surety as against

<sup>4</sup> Stearns, Law of Suretyship, p. 449. A bond of a surety company must be construed like a contract of insurance. *American Surety Co. v. Trust Co.* (Tex. Civ. App. 1906) 98 S. W. 387.

<sup>5</sup> *American Surety Co. v. Thurber*, 121 N. Y. 655, 23 N. E. 1129; *Hydraulic Press Brick Co. v. Neumeister*, 15 Mo. App. 592.

<sup>6</sup> *Dendy v. Gamble*, 59 Ga. 434; *Boston & S. Glass Co. v. Moore*, 119 Mass. 435.

<sup>7</sup> *Nell v. Ohio College*, 31 Ohio St. 15.

<sup>8</sup> *Cunningham v. Wrenn*, 23 Ill. 64.

<sup>9</sup> *SMITH v. VAN WYCK*, 40 Mo. App. 522; *Hood v. Grace*, 7 Hurl. & N. 494.

the creditor or obligee;<sup>10</sup> but the facts must be shown clearly and without a shadow of a doubt.<sup>11</sup> It must appear that the contract does not show the intention of both parties. The fact that a mistake existed as to one party only will not be sufficient, unless fraud on the part of the other can be shown.\*

*Meaning of Words.*

The language employed in a contract of suretyship should be interpreted according to its generally accepted meaning,<sup>12</sup> without enlargement or restriction, unless it be ascertained that the parties themselves intended some other meaning.<sup>13</sup> That other than the general meaning was intended may be indicated from the context;<sup>14</sup> and oral evidence of a usage of trade or occupation may be offered to show that the ordinary and popular meaning of a word was not intended.

*Intention Governs.*

The true rule for construction of contracts is to give effect to the intention of the parties.<sup>15</sup> This intention must be gathered from the instrument, read in the light of surrounding

<sup>10</sup> *Olmsted v. Olmsted*, 88 Conn. 309; *Henkleman v. Peterson*, 154 Ill. 419, 40 N. E. 359; *State, to Use of Frank, v. Frank's Adm'r*, 51 Mo. 98; *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33; *Clute v. Knies*, 102 N. Y. 377, 7 N. E. 181; *PRIOR v. WILLIAMS*, 3 Abb. Dec. (N. Y.) 624; *Butler v. Durham*, 38 N. C. 589; *Nelninger v. State*, 50 Ohio St. 394, 34 N. E. 633, 40 Am. St. Rep. 674; *Town of Rutland v. Paige*, 24 Vt. 181; *Percival v. McCoy* (C. C.) 13 Fed. 379. See, also, *Weaver v. Shryock*, 6 Serg. & R. (Pa.) 262.

<sup>11</sup> *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33; *Moser v. Libenguth*, 2 Rawle (Pa.) 428.

\* *Fetter, Equity*, p. 314.

<sup>12</sup> *McCluskey v. Cromwell*, 11 N. Y. 593; *Chase v. McDonald*, 7 Har. & J. (Md.) 160.

<sup>13</sup> A guaranty of a contract "so far as they pertain to said" principal is enforceable. The use of "they" for "it" is not uncertain. *De Reszke v. Duss*, 99 App. Div. 353, 91 N. Y. Supp. 221.

<sup>14</sup> *Taylor v. Smith*, 116 N. C. 531, 21 S. E. 202.

<sup>15</sup> *Punta Gorda Bank v. State Bank* (Fla. 1907) 42 South. 846; *Tal-madge v. Williams*, 27 La. Ann. 653; *SMITH v. MOLLESON*, 148 N. Y. 241, 42 N. E. 669; *PEOPLE v. BACKUS*, 117 N. Y. 196, 22 N. E. 759; *EVANSVILLE NAT. BANK v. KAUFMANN*, 83 N. Y. 273, 45 Am. Rep. 204; *Schultz v. Crane*, 6 Hun (N. Y.) 236; *TAYLOR v. WETMORE*, 10 Ohio, 491; *Moore v. Holt*, 10 Grat. (Va.) 284. See *Clark, Contracts* (2d Ed.) p. 402.

circumstances.<sup>16</sup> Whenever the intention of the parties has been ascertained, the rule of strict construction applies, and a surety may stand upon the precise terms of his contract.<sup>17</sup> If the parties have agreed, the court cannot make a contract for them.

The intention of the parties may be clearly expressed in the instrument; but, if not, such intention may be gathered from the circumstances of the case.<sup>18</sup> Thus, where there was a guaranty of payment of the interest of a bond which did not stipulate for interest, the guarantor must have intended to become liable for the interest to accrue after the maturity of the bond.<sup>19</sup>

*Intention Gathered from Entire Contract.*

All parts of the contract must be considered in order to arrive at the intention of the parties.<sup>20</sup> Where a contract and a guaranty thereof are made at the same time, the two instruments must be construed together.<sup>21</sup>

<sup>16</sup> *Lewis v. Dwight*, 10 Conn. 95; *Ewen v. Wilbor*, 99 Ill. App. 132; *Talmadge v. Williams*, 27 La. Ann. 653; *Belloni v. Freeborn*, 63 N. Y. 383; *De Camp v. Bullard*, 33 App. Div. 627, 53 N. Y. Supp. 1102; *Hooper v. Hooper*, 81 Md. 155, 31 Atl. 508, 48 Am. St. Rep. 496; *Birdsall v. Heacock*, 32 Ohio St. 177, 30 Am. Rep. 572; *Balley v. Larchar*, 5 R. I. 530; *Lawrence v. McCalmont*, 2 How. (U. S.) 426, 11 L. Ed. 326.

<sup>17</sup> *Dustin v. Hodgen*, 47 Ill. 125; *Markland Min. & Mfg. Co. v. Kimmel*, 87 Ind. 560; *Kepley v. Carter*, 49 Kan. 72, 30 Pac. 182; *Columbus Sewer Pipe Co. v. Ganser*, 58 Mich. 385, 25 N. W. 377, 55 Am. Rep. 697; *Cushing v. Cable*, 48 Minn. 3, 50 N. W. 891; *Crane Co. v. Specht*, 39 Neb. 123, 57 N. W. 1015, 42 Am. St. Rep. 562; *Belloni v. Freeborn*, 63 N. Y. 383; *State v. Medary*, 17 Ohio, 554; *Staver & Walker v. Locke*, 22 Or. 519, 30 Pac. 497, 17 L. R. A. 652, 29 Am. St. Rep. 621; *Smith v. Montgomery*, 3 Tex. 199; *Miller v. Stewart*, 9 Wheat. (U. S.) 680, 6 L. Ed. 189.

<sup>18</sup> *Standley v. Miles*, 36 Miss. 434; *PEOPLE v. BACKUS*, 117 N. Y. 196, 22 N. E. 759; *EVANSVILLE NAT. BANK v. KAUFMANN*, 93 N. Y. 274, 45 Am. Rep. 204; *Birdsall v. Heacock*, 32 Ohio St. 177, 30 Am. Rep. 572; *DAVIS v. WELLS*, 104 U. S. 164, 26 L. Ed. 686.

<sup>19</sup> *Hamilton v. Van Rensselaer*, 43 Barb. (N. Y.) 117.

<sup>20</sup> *Rouss v. Creglow*, 103 Iowa, 60, 72 N. W. 429.

<sup>21</sup> *Bogardus v. Manufacturing Co.*, 120 Ill. App. 46; *First Nat. Bank v. School Dist.* (Neb. 1906) 110 N. W. 349; *SMITH v. MOLLESON*, 148 N. Y. 241, 42 N. E. 669; *UNION BANK OF LOUISIANA v. COSTER*, 3 N. Y. 203, 53 Am. Dec. 280; *Marsh v. Chamberlain*, 2 Lans. (N. Y.) 287. Where a bond is given to secure the performance

The most frequent application of this rule applies in the case of penal bonds, which are entered into to secure the proper performance of some act. Such a bond, if formally drawn, consists of three parts, known as the penal or obligatory part, the recital, and the condition.<sup>23</sup> The penal portion is in the form of an absolute obligation to pay a sum of money named therein, known as the penalty. The recital states the circumstances under which the bond was given; that, for illustration, a certain named person has been appointed to a designated office, and the facts connected therewith. The condition provides that the bond shall be void if the acts, to secure the performance of which the bond was given, have been fully and properly performed; otherwise, to remain in full force. In construing a penal bond, all the parts must be considered together,<sup>23</sup> and a statement in one part may be qualified by some clause in another part.<sup>24</sup> If the recital names a term for which the officer has been appointed or elected, it will be construed as being the intention of the sureties to be bound no longer than that term, although the condition may provide that the bond shall remain in force as long as the said officer shall continue in office.<sup>25</sup> The two clauses are not regarded as inconsistent, but as meaning that the sureties intend to be bound so long as the officer remains in office, not exceeding the term named. In other words, they will be bound for his term; but their liability might be terminated sooner,

of an agreement, and the bond recites some, but not all, of the obligations of the agreement, liability on the bond will be limited to the recitals contained therein; the agreement not being incorporated in the bond by reference thereto. *Oregon R. & Nav. Co. v. Swinburne*, 22 Or. 574, 30 Pac. 322; *Singer Mfg. Co. v. Hester* (C. C.) 6 Fed. 804.

<sup>23</sup> See forms in Appendix, post, p. 403.

<sup>23</sup> *Wilson v. Webber*, 157 N. Y. 693, 51 N. E. 1094, affirming 92 Hun, 466, 36 N. Y. Supp. 550. Where the principal enters into a recognition of \$100, and the sureties \$200, they can be held for \$100 only. *People v. Morrison*, 75 Mich. 30, 42 N. W. 531.

<sup>24</sup> Where a bond given to secure the performance of an agent's duties specifies the extent of the agency, sureties will not be liable for money of the employer received by the agent outside of the particular agency specified. *Napier v. Bruce*, 8 Clark & F. 470.

<sup>25</sup> *Arlington v. Merricks*, 2 Saund. 403; *Liverpool Waterworks v. Atkinson*, 6 East, 507.

if he should die or resign before his term ended. The length of time for which they were to be liable might be shortened, but would not be lengthened.

*Valid Rather Than Invalid Meaning Given.*

The policy of the courts is to apply such a construction as will render the contract valid, rather than otherwise, if it can do so without importing terms into the contract which do not appear. Thus, a guaranty of a note "when due" is not to be construed as impossible of fulfillment because the note was overdue at the time the guaranty was made; but, as the parties knew that the day of payment was past, the guaranty was equivalent to a guaranty of a note payable on demand, and such would be taken to be the intention of the guarantor.<sup>26</sup>

Where a bond is so worded as to render it nearly impossible to comply with the conditions, and hold a surety thereon liable, the court will apply such a construction as will prevent the bond from becoming practically invalid. Thus, a stipulation that an employer (the obligee) must give notice to the surety of any act of the employé (the principal) for whose fidelity the bond has been given, which "may" lead to default, will be construed to mean that the employer need not report mere suspicions, but he will be required to act in event only of acquiring knowledge of some act which might involve the surety in liability.

Courts, however, will not go to the extent of importing into the contract terms which have been omitted, or alter terms, although the result is to make the obligation void. A bond without a penalty,<sup>27</sup> or without an obligee, will not be enforced. So, if an appeal bond recites an appellate court which has no existence, the court will not make any change. To do so would be for the court, and not the parties, to make the contract.<sup>28</sup> Where an appeal bond described land which had no

<sup>26</sup> Crocker v. Gilbert, 9 Cush. (Mass.) 181; Gunn v. Madigan, 28 Wis. 158. A guaranty that a note, payable in the future, is due, and that the maker has nothing to file against it, will be construed to have reference to the liability of the maker at maturity. Adams v. Clarke, 14 Vt. 9.

<sup>27</sup> Austin v. Richardson, 1 Grat. (Va.) 310.

Tucker v. State, 11 Md. 322.

existence, although it follows a description given in a mortgage, it cannot be shown that other land was intended.<sup>29</sup>

*Language Construed Against Party Using It.*

The general rule of contracts, that ambiguous language will be taken most strongly against the party using it, applies to contracts of suretyship.<sup>30</sup> Thus, where a bond, given to secure the performance of a contract for furnishing granite for a public building, provided for monthly payments of not to exceed 80 per cent. of "the estimated value of the work performed on the building," the contention was whether the "estimated value" was to be made upon the work when actually set in the building, or upon the work performed in quarrying, transporting, and dressing the granite, whether it actually was placed in the building or not. The obligee, having acted upon the latter interpretation, and it being reasonable, the surety was not allowed to insist upon his interpretation of the ambiguous language used by him.<sup>31</sup>

*Construction by Parties.*

The construction which the parties themselves have placed upon their contract should prevail,<sup>32</sup> even over its literal meaning.<sup>33</sup> Thus, a guaranty which, standing alone, might have been construed as noncontinuing, will be construed as continuing if the parties, for some time, have acted upon it as continuing.<sup>34</sup> By giving a contract the same construction that

<sup>29</sup> *Ogden v. Davis*, 116 Cal. 32, 47 Pac. 772.

<sup>30</sup> *Hoey v. Jarman*, 39 N. J. Law (10 Vroom) 523; *Gates v. McKee*, 13 N. Y. 237, 64 Am. Dec. 545; *Crist v. Burlingame*, 62 Barb. (N. Y.) 351; *Batley v. Larchar*, 5 R. I. 530; *American Surety Co. v. Trust Co. (Tex. Civ. App. 1906)* 98 S. W. 387; *Lawrence v. McCalmont*, 2 How. (U. S.) 450, 11 L. Ed. 326; *Cremer v. Higginson*, 1 Mason (U. S.) 323, Fed. Cas. No. 3,383; *Wood v. Priestner*, L. R. 2 Exch. 66; *Merle v. Wells*, 2 Camp. 413.

<sup>31</sup> *SMITH v. MOLLESON*, 148 N. Y. 241, 42 N. E. 669.

<sup>32</sup> *Burgess v. Badger*, 124 Ill. 238, 14 N. E. 850; *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. 903; *Dwelley v. Dwelley*, 143 Mass. 509, 10 N. E. 468; *Thompson v. Prouty*, 27 Vt. 14.

<sup>33</sup> *District of Columbia v. Gallaher*, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. Ed. 526.

<sup>34</sup> *Michigan State Bank v. Peck*, 28 Vt. (2 Williams) 200, 65 Am. Dec. 234. So an intention to make a letter of credit general will be shown by the guarantor's acts. *UNION BANK OF LOUISIANA v. COSTER*, 3 N. Y. 203, 53 Am. Dec. 280.

the parties themselves have given to it is not varying it, but is establishing the real contract. The construction given by the parties may be ascertained from their declarations, or from their conduct. Where only one of the parties has acted upon some special interpretation given by himself, it cannot affect the other.

*Express and Implied Terms.*

While a contract of suretyship will never be implied in the sense in which the word is used generally in the law of contracts, there are some contracts of suretyship which are so common, and the rights and liabilities under which have been so often the subject of judicial interpretation, that a person, by becoming a party to them, will be presumed to have assumed the liabilities incident to his contract.<sup>85</sup> Such is the case where the holder of a negotiable instrument places his name on the back and transfers the instrument to another. Although he has not made a definite contract, the law supplies the deficiency, and makes it for him,<sup>86</sup> and, in most jurisdictions, he will not be allowed to vary the contract implied by his indorsement in blank.<sup>87</sup>

It always is competent for the parties to a contract of suretyship, by express stipulations therein, to extend or restrict the rights and liabilities of a surety, and make them different from those which would be implied by law; and, where the parties have agreed upon terms mutually satisfactory, different from those implied by law, they should be permitted to stand upon those terms, as being the real contract, rather than force upon them, by implication, a contract which they did not intend.

*Construction as Affected by Statutes.*

The general rule is that, where a contract of suretyship is entered into pursuant to a statute<sup>88</sup> or to a by-law,<sup>89</sup> the statute

<sup>85</sup> *Monson v. Drakeley*, 40 Conn. 552, 16 Am. Rep. 74; *Sweet v. McAllister*, 4 Allen (Mass.) 353.

<sup>86</sup> See post, c. VIII, note 14.

<sup>87</sup> *Norton, Bills and Notes* (3d Ed.) p. 114.

<sup>88</sup> *People v. Toomey*, 122 Ill. 308, 13 N. E. 521; *Johnson v. Elevator Co.*, 105 Ill. 462; *Reynolds v. Hall*, 2 Ill. 35; *County of Scott v. Ring*, 29 Minn. 398, 13 N. W. 181; *State, to Use of City of St. Louis, v. Thornton*, 8 Mo. App. 27.

<sup>89</sup> *Danvers Farmers' Elevator Co. v. Johnson*, 93 Minn. 323, 101 N. W. 492.

or by-law forms a part of his contract. If the law has made the instrument necessary, the parties are deemed to have had the law in contemplation when the contract was executed.<sup>40</sup> Thus, where a law concerning the sale of school lands prescribed the form of notes to be taken for the purchase price, and made then joint and several, and provided that sureties thereon should be liable as the principal, a surety was held to the liability prescribed by the statute, for he was presumed to know the law.<sup>41</sup> So, where a statute made a public officer custodian of public moneys, sureties upon his bond will be liable for such money as comes into his hands in his official capacity only, and not for moneys of which he becomes a voluntary custodian. Where, however, the contract is clearly inconsistent with the statute, the contract will not be construed to enlarge the liability of a surety beyond its terms.<sup>42</sup>

*Amendments to Statutes.*

Where a statute has been amended or repealed after a contract has been executed pursuant thereto, a surety on the contract may incur additional liabilities,<sup>43</sup> or his contract may be terminated, according to the extent of the change made. Sureties upon bonds given for the faithful performance of duties by public officers are presumed to contemplate possible amendments to the statute, and impliedly to agree to remain bound.<sup>44</sup> Such a rule is indispensable to the proper management of public affairs; but this implication extends to the imposition of new duties of the same general character as those imposed at the time of the execution of the bond, and come fairly within the scope of the office.<sup>45</sup> A surety will not be

<sup>40</sup> *Van Epps v. Walsh*, 1 Woods (U. S.) 598, Fed. Cas. No. 16,850. Where, at the time of the execution of a bond, a statute has been passed, which does not take effect until later, it does not affect the liability of the parties to the bond. *Mix v. Vall*, 86 Ill. 40.

<sup>41</sup> *Powell v. Kettelle*, 1 Gilman (Ill.) 491.

<sup>42</sup> *Howard County Com'rs v. Hill*, 88 Md. 111, 41 Atl. 61; *Davis v. Van Buren*, 72 N. Y. 587; *Wood v. Flisk*, 63 N. Y. 245, 20 Am. Rep. 528.

<sup>43</sup> *State v. Smith*, 16 Fla. 175. See post, § 108, as to extensions of time given by Legislature to public officers.

<sup>44</sup> *Dawson v. State*, 38 Ohio St. 1; *Borden v. Houston*, 2 Tex. 594.

<sup>45</sup> *Smith v. Peoria County*, 59 Ill. 412; *Governor of Illinois v. Ridgway*, 12 Ill. 14; *Bartlett v. Governor*, 2 Bibb (Ky.) 586; *People v. Vilas*, 36 N. Y. 459, 38 Am. Dec. 520.



held to liability as to duties which had no statutory existence at the time of the execution of the bond, and which could not have been in contemplation at that time.<sup>46</sup> Thus, where it was the duty of an officer to receive public money, a new statute might be enacted, which makes it his duty to receive additional funds from another source, and a surety on his bond would be liable for a default as to such additional funds; but, where it was not the duty of a public officer to receive public funds, a statute making him the custodian of certain public money could not impose upon his surety a liability as to such money.<sup>47</sup> In the first case, it was not unreasonable to suppose that an officer, whose duty it is to receive money, might be made the custodian of additional sums, and his sureties, when they executed the bond, might be supposed reasonably to have had this possibility in mind; but, where the duties of an office are not connected with the receipt of money, it cannot be supposed that his sureties could have had in contemplation the possibility of his becoming the custodian of funds. They might be satisfied as to his ability to perform certain duties; but it would not follow that they regarded him as a trustworthy custodian of the public money. It is not the same office within the meaning of the bond.<sup>48</sup>

*Sureties Favorites of the Law.*

While a surety is denominated a favorite of the law, there is a very limited field for the application of this doctrine.<sup>49</sup> The nature of the contract invokes equitable considerations,

<sup>46</sup> *People v. Pennock*, 60 N. Y. 421.

<sup>47</sup> *People v. Tompkins*, 74 Ill. 482; *White v. East Saginaw*, 43 Mich. 567, 6 N. W. 86.

<sup>48</sup> *Phybus v. Gibbs*, 6 E. & B. 88. Sureties on a joint bond are not affected by a subsequent statute making them severally liable. *Fielden v. Lahens*, 6 Blatchf. (U. S.) 524, Fed. Cas. No. 4,773. Where a treasurer held office during the pleasure of the Governor, and gave a bond conditioned for his good behavior, a subsequent statute making the office elective and the term three years discharged the sureties, although the same person was elected. They might have been willing to be bound if he could be removed at any time, but not if he was to hold office for a fixed period. *Queen v. Hall*, 1 Up. Can. C. P. 406.

<sup>49</sup> *Ulster County Sav. Inst. v. Young*, 161 N. Y. 23, 55 N. E. 483. The courts are not inclined to extend the rule that a surety is a favorite of the law to surety companies. *Walker v. Holtzclaw*, 57 S. C. 459, 35 S. E. 754.

but the general rules for the construction of contracts are not excluded thereby. His liability will not be extended by implication, and his contract is strictly construed.<sup>50</sup> The terms of his contract cannot be varied, although he may sustain no injury thereby, or even though he might be benefited.<sup>51</sup> In cases of doubt, the doubt is solved generally in his favor.<sup>52</sup> Thus, where the penalty named in the obligatory part of a bail bond was \$2,000, the sureties would not be liable for more, although the condition recites that the accused had been held to bail in the sum of \$2,500.<sup>53</sup>

#### PROMISE ESSENTIAL TO A GUARANTY.

**92. To constitute a guaranty, it is essential that the language must amount to a promise.**

<sup>50</sup> *State v. Churchill*, 48 Ark. 426, 3 S. W. 852, 830; *Jack v. Sinshelmer*, 125 Cal. 563, 58 Pac. 130; *Raney v. Baron*, 1 Fla. (Branch) 327; *Vinyard v. Barnes*, 124 Ill. 346, 16 N. E. 254; *Mix v. Singleton*, 86 Ill. 194; *Weir Plow Co. v. Walmsley*, 110 Ind. 242, 11 N. E. 232; *Noyes v. Granger*, 51 Iowa, 227, 1 N. W. 519; *Dry Goods Co. v. Yearont*, 59 Kan. 684, 54 Pac. 1062; *New Orleans Canal & Banking Co. v. Hagan*, 1 La. Ann. 62; *Manufacturers' Bank v. Cole*, 39 Me. 188; *First Nat. Bank of Baltimore v. Gerke*, 68 Md. 449, 13 Atl. 358, 6 Am. St. Rep. 453; *Gunn v. Geary*, 44 Mich. 615, 7 N. W. 235; *Bishop v. Freeman*, 42 Mich. 533, 4 N. W. 290; *Dick v. Crowder*, 18 Miss. (10 Smedes & M.) 71; *Blair v. Insurance Co.*, 10 Mo. 559, 47 Am. Dec. 129; *Harvey v. Bank*, 56 Neb. 320, 76 N. W. 870; *People v. Chalmers*, 60 N. Y. 154; *Walsh v. Baille*, 10 Johns. (N. Y.) 180; *Lang v. Pike*, 27 Ohio St. 498; *Hutchinson v. Woodwell*, 107 Pa. 509; *McGough v. Birmingham*, 29 Pittsb. Leg. J. (O. S.) 178; *State v. Evans*, 32 Tex. 200; *Coughran v. Bigelow*, 9 Utah, 260, 34 Pac. 51; *Burson v. Andes*, 83 Va. 445, 8 S. E. 249; *Leggett v. Humphreys*, 21 How. (U. S.) 66, 16 L. Ed. 50; *United States v. Cheeseman*, 3 Sawy. (S. W.) 424, Fed. Cas. No. 14,790. On the other hand, a surety's engagement does not require a forced and unreasonable construction, with a view of relieving him. *Irwin v. Kilburn*, 104 Ind. 113, 3 N. E. 650.

<sup>51</sup> *City Council of Greenville v. Ormand*, 51 S. C. 121, 28 S. E. 147; *General Navigation Co. v. Roltz*, 6 C. B. (N. S.) 550.

<sup>52</sup> *Stull v. Hance*, 62 Ill. 52; *Shine's Adm'r v. Central Sav. Bank*, 70 Mo. 524; *Crist v. Burlingame*, 62 Barb. (N. Y.) 851; *Bailey v. Larchar*, 5 R. I. 530.

<sup>53</sup> *Hodges v. State*, 20 Tex. 493.

**REQUEST OR RECOMMENDATION NOT A GUARANTY.**

**93. A request to a person to extend credit to another is not a guaranty. Neither is a letter of recommendation.**

While it is not necessary, in order to constitute a guaranty, that the words "guaranty" or "promise" be used, it is essential that words be used which clearly import a promise.<sup>54</sup> A statement that the writer "has no objection to guaranty" is not a guaranty, but an overture only.<sup>55</sup> So a statement that the writer considers the bearer good, and will indorse him to a certain amount, specifies the method in which the writer is willing to become liable.<sup>56</sup> It does not follow, however, that the use of the future tense, as "I will guaranty," necessarily imports an offer.

Where a person, in transferring the negotiable instrument of a third person, uses the words, "holden,"<sup>57</sup> "good," or "safe,"<sup>58</sup> it will amount to a guaranty.

*Requests and Recommendations.*

It sometimes happens that a person, unacquainted with the nature of a contract of guaranty, acts upon a mere request to sell goods to another, or to extend credit to him, supposing that the written request renders the writer liable as a guarantor;<sup>59</sup> but, in order to hold a person as such, it must be shown clearly that he intended to assume that liability.

<sup>54</sup> A promise that the creditor will be "taken care of" is a guaranty. *DOVER STAMPING CO. v. NOYES*, 151 Mass. 342, 24 N. E. 53. But the remark, "If W. is not good enough, I am," and the answer, "Yes, for \$10,000, if you requested it," do not create a contract. *Unangst v. Hibler*, 26 Pa. (2 Casey) 150. Whether or not the language used amounts to a guaranty, or not, is a question of law. *Ferris v. Walsh*, 5 Har. & J. (Md.) 306.

<sup>55</sup> *Stafford v. Low*, 16 Johns. (N. Y.) 67; *Symmons v. West*, 2 Starkie, 371; *McIVER v. RICHARDSON*, 1 Maule & S. 557.

<sup>56</sup> *Stockbridge v. Schoonmaker*, 45 Barb. (N. Y.) 100.

<sup>57</sup> *Irish v. Cutter*, 31 Me. 536.

<sup>58</sup> *Union Nat. Bank v. First National Bank*, 45 Ohio St. 236, 13 N. E. 884; *Sturges v. Circleville Bank*, 11 Ohio St. 153, 78 Am. Dec. 296. A stipulation, in an agreement for the sale of goods, that the price shall be paid in "good obligations," does not amount to a guaranty of the notes taken by the seller in payment, but gives the latter the right to refuse notes which are not good. *Corbet v. Evans*, 25 Pa. 310.

<sup>59</sup> *Bushnell v. Bishop Hill Colony*, 28 Ill. 204; *Thomas v. Wright*, 98 N. C. 272, 3 S. E. 487.

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Letters of recommendation or of introduction, or expressions of opinion or confidence as to the financial ability or reputation of another, are not guaranties, and the writer incurs no liability to one acting upon them,<sup>60</sup> unless the writer has been guilty of deceit; and then he is liable for his tort, and not as a guarantor. A letter read as follows: "I have the pleasure of recommending to you my friend, James Barker, as a person in whom confidence can be placed. I am due him \$400, but it is inconvenient for me to raise the money just now. Should you give him time on the machine till 1st December, it will confer a favor on me, and you may rest assured that the money will be forthcoming at the proper time." The writer was held not to be liable as a guarantor of the price of a machine, which was sold by the addressee on the strength of this letter, as there was no promise.<sup>61</sup>

*Guaranty of Payment or of Collection.*

The words, "I guaranty the within note," written upon the back of a promissory note, and signed, make the writer a guarantor, instead of an indorser,<sup>62</sup> or a maker;<sup>63</sup> and such a guaranty will be construed to be one of payment, and not of collectibility,<sup>64</sup> unless the language indicates otherwise.<sup>65</sup>

<sup>60</sup> Baker v. Trotter, 73 Ala. 277; Switzer v. Baker, 95 Cal. 539, 30 Pac. 761; Bushnell v. Bishop Hill Colony, 28 Ill. 204; Case v. Luse, 23 Iowa, 527; Eaton v. Mayo, 118 Mass. 141; Hughes v. Peper Co., 139 N. C. 158, 51 S. E. 793, 1 L. R. A. (N. S.) 305, 111 Am. St. Rep. 778; Kimball v. Royce, 9 Rich. Law (S. C.) 295; Mitchell v. Stewart, 10 Helsk. (Tenn.) 18. In Moore v. Holt, 10 Grat. (Va.) 284, a letter of introduction, containing the clause, "With assurances that any contract of his will and shall be promptly paid," was held to be a guaranty.

<sup>61</sup> Case v. Luse, 28 Iowa, 527.

<sup>62</sup> Belcher v. Smith, 7 Cush. (Mass.) 482; Miller v. Gaston, 2 Hill (N. Y.) 188; Snevily v. Ekel, 1 Watts & S. (Pa.) 203; Central Trust Co. of New York v. Bank, 101 U. S. 68, 25 L. Ed. 876.

<sup>63</sup> President of Oxford Bank v. Haynes, 8 Pick. (Mass.) 423, 19 Am. Dec. 334; National Loan & Building Ass'n v. Lichtenwalner, 100 Pa. 100, 45 Am. Rep. 359. Where the indorsement on a note was, "I hereby acknowledge to be security for the within amount of \$500 until satisfactorily paid," the signer was held liable as a surety, and not as a guarantor. Marberger v. Pott, 16 Pa. 9, 55 Am. Dec. 479.

<sup>64</sup> Winchell v. Doty, 15 Hun (N. Y.) 1.

<sup>65</sup> A guaranty of "ultimate" or "final" payment is a guaranty of collectibility. Ely v. Bibb, 4 J. J. Marsh. (Ky.) 71; Huntress v. Pat-

*Continuing and Noncontinuing Guaranties.*

One of the most perplexing questions which the courts are called upon to decide is whether a guaranty is continuing or noncontinuing; and it seems to be impossible to formulate any rule or set of rules of construction which will aid in determining this question, but resort must be had to the general rules applicable to all contracts, and each particular case must depend upon its own facts. Precedents are of little use in cases of this kind, but the ambiguity must be cleared by ascertaining the intention of the parties, which must be sought, not only from the instrument itself, but from the situation and relation of the parties at the time of the execution of the contract, and their course of dealing.<sup>66</sup>

ten, 20 Me. 28; *Lewis v. Hoblitzell*, 6 Gill & J. (Md.) 259; *Hernandez v. Stillwell*, 7 Daly (N. Y.) 360; *Bank of Sandusky v. Follett*, 2 West. Law J. (Ohio) 78; *Johnston v. Mills*, 25 Tex. 704. So is a guaranty that a note is "good." *Cowles v. Pick*, 55 Conn. 251, 10 Atl. 569, 3 Am. St. Rep. 44; *Curtis v. Smallman*, 14 Wend. (N. Y.) 231; *Cooke v. Nathan*, 16 Barb. (N. Y.) 342; *Union Nat. Bank v. First Nat. Bank*, 45 Ohio St. 236, 13 N. E. 884; *Hammond v. Chamberlin*, 26 Vt. 406. In the following cases, the expressions used were held to be guaranties of collectibility: "To be liable only in second instance." *Pittman v. Chisolm*, 43 Ga. 442. "To pay any deficiency." *McMURRAY v. NOYES*, 72 N. Y. 523, 28 Am. Rep. 180. "In case he fails to recover." *Jones v. Ashford*, 79 N. C. 172. "If bearer fails to collect, to be responsible." *Evans v. Bell*, 45 Tex. 553. "If creditor will endeavor to collect." *Phenix Ins. Co. v. Louisville Co. (C. C.)* 8 Fed. 142. In *Taylor v. Soper*, 53 Mich. 96, 18 N. W. 570, and *Kock v. Melhorn*, 25 Pa. 89, 64 Am. Dec. 685, expressions to the effect that a note was as "good" as money were held to be guaranties of payment; but a guaranty that the maker is "good and solvent" is one of collectibility. *Kinyon v. Brock*, 72 N. C. 554. In Pennsylvania, guaranties of payment are regarded generally as guaranties of collectibility. See *Tisue v. Hanna*, 153 Pa. 384, 27 Atl. 1104.

<sup>66</sup> *White's Bank of Buffalo v. Myles*, 73 N. Y. 335, 29 Am. Rep. 157. And see ante, note 16. In the following cases the guaranties were held to be continuing: *Cahuzac v. Samini*, 29 Ala. 288; *Lewis v. Dwight*, 10 Conn. 95; *Trustees of Presbyterian Board of Publication & Sabbath-School Work v. Gilliford*, 139 Ind. 524, 38 N. E. 404; *Clark v. Hyman*, 55 Iowa, 14, 7 N. W. 386, 39 Am. Rep. 160; *Lowe v. Beckwith*, 53 Ky. (14 B. Mon.) 184, 58 Am. Dec. 659; *Grant v. Ridsdale*, 2 Har. & J. (Md.) 186; *Melendy v. Capen*, 120 Mass. 222; *Mathews v. Phelps*, 61 Mich. 327, 28 N. W. 108, 1 Am. St. Rep. 581; *Tootle v. Elgutter*, 14 Neb. 158, 15 N. W. 228, 45 Am. Rep. 103; *People v. Lee*, 104 N. Y. 441, 10 N. E. 884; *City Nat. Bank of Poughkeepsie v. Phelps*, 86

To illustrate the different conclusions reached as to guaranties worded very similarly, take the two following: "Please let my daughter have what goods she wants, and I will stand good for the money to settle the bills."<sup>67</sup> And: "If you will let the bearer have what leather he wants, and charge the same to himself, I will see that you have your pay in a reasonable length of time."<sup>68</sup> It would seem that they were either both continuing or both limited; but the former was held to be continuing, and the latter limited.<sup>69</sup>

While it is clear that, if the object is to give a standing credit to the principal to be used from time to time, the guaranty is continuing,<sup>70</sup> it is not so easy to determine whether its object is to give a succession of credits.

*Limitation as to Amount.*

The uncertainty is still further complicated where the guaranty names an amount for which the guarantor will be liable.

N. Y. 494, affirming, as to this point, 16 Hun, 158; *Straus v. Beardsley*, 79 N. C. 59; *Wolf v. Shillito*, 9 Ohio Dec. 273, 12 Wkly. Law Bul. 31; *Gardner v. Watson*, 76 Tex. 25, 13 S. W. 39; *Michigan State Bank v. Peck*, 28 Vt. (2 Williams) 200, 65 Am. Dec. 234; *Young v. Brown*, 53 Wis. 333, 10 N. W. 394; *Lawrence v. McCalmont*, 43 U. S. (2 How.) 426, 11 L. Ed. 326; *Hargreave v. Smee*, 6 Bing. 244, 3 Moore & P. 573; *Martin v. Wright*, 6 Ad. & El. (N. S.) 917. In the following cases the guaranties were held to be noncontinuing: *Perryman v. McCall*, 66 Ala. 402, 41 Am. Rep. 752; *Patterson v. Gage*, 11 Colo. 50, 16 Pac. 560; *White v. Reed*, 15 Conn. 457; *Williams v. Wyatt*, 7 Ky. Law Rep. 444; *Gerson v. Hamilton*, 30 La. Ann. 737; *Knowlton v. Hersey*, 76 Me. 345; *Callender, McAuslan & Troup Co. v. Flint*, 187 Mass. 104, 72 N. E. 345; *Twohy v. McMurran*, 57 Minn. 242, 59 N. W. 301; *SMITH v. VAN WYCK*, 40 Mo. App. 522; *Schwartz v. Hyman*, 107 N. Y. 562, 14 N. E. 447; *Whitney v. Groot*, 24 Wend. 82; *Hayden v. Crane*, 1 Lans. (N. Y.) 181; *Morgan v. Boyer*, 39 Ohio St. 324, 48 Am. Rep. 454; *Blrdsall v. Heacock*, 82 Ohio St. 177, 30 Am. Rep. 572; *Anderson v. Blakely*, 2 Watts & S. (Pa.) 237; *Congdon v. Read*, 7 R. I. 576; *Frost v. Weathersbee*, 23 S. C. 354; *Hilliard v. Hons*, 37 Tex. 717; *Nicholson v. Paget*, 1 Crompt. & M. 48. And see 25 Cent. Dig. col. 103.

<sup>67</sup> *Wright v. Griffith*, 121 Ind. 478, 23 N. E. 231, 6 L. R. A. 639.

<sup>68</sup> *Gard v. Stevens*, 12 Mich. 292, 86 Am. Dec. 52.

<sup>69</sup> See *Stearns, Law of Suretyship*, p. 70.

<sup>70</sup> *Hotchkiss v. Barnes*, 34 Conn. 27, 91 Am. Dec. 713; *Reed v. Fish*, 59 Me. 358; *Boston & S. Glass Co. v. Moore*, 119 Mass. 435; *Anderson v. Blakely*, 2 Watts & S. (Pa.) 237; *Congdon v. Read*, 7 R. I. 576; *Boyce v. Ewart*, 1 Rice (S. C.) 126.

Does he mean that he will be liable for one transaction not to exceed that amount? or that he will be liable for continued dealing until the total amount of all the transactions should reach the amount named, and no further? or does he intend to be liable for an indefinite time, and to be responsible for all transactions so long as the unpaid balance due from the principal shall not exceed the sum named? A., a country merchant, goes to the city to buy goods, and he offers to his creditor a guaranty which reads as follows: "I guaranty the payment of goods which you may sell to A., not exceeding \$1,000." This is capable of three constructions, and none of them will be strained. Suppose A. to buy, at the time he presents the guaranty, \$500 worth of goods. At another time he buys another \$500 worth. Later he pays \$500 on account, and buys additional goods to the amount of \$500, and makes no further payments. Demand is made of the guarantor for the \$1,000 due. The latter might say that his intention was to become responsible for whatever goods were purchased the first time only, not exceeding \$1,000, and that, upon learning that \$500 worth only had been purchased at that time, which subsequently had been paid for, he had taken no steps to protect himself; or he might say that he was willing to become responsible for \$1,000 worth of goods, whether purchased at one or more times, but that, \$500 having been paid, he was liable for \$500 only.<sup>71</sup> The creditor might claim that the meaning of the contract was that the guarantor would be liable for all goods sold at all times, provided the balance remaining unpaid did not exceed \$1,000.<sup>72</sup> The first of the three constructions—that

<sup>71</sup> *Cremer v. Higginson*, 1 Mason (U. S.) 323, Fed. Cas. No. 3,883; *GRAY v. SECKHAM*, [1872] 7 Ch. App. 680; *Kay v. Groves*, 6 Bing. 276, 3 Moore & P. 634; *Kirby v. Marlborough*, 2 Maule & S. 18.

<sup>72</sup> *Taussig v. Reid*, 145 Ill. 488, 30 N. E. 1032, 32 N. E. 918, 36 Am. St. Rep. 504; *SHERBURNE v. PAPER CO.*, 40 Ill. App. 383; *Lane v. Mayer*, 15 Ind. App. 382, 44 N. E. 73; *Sherman v. Mulloy*, 174 Mass. 41, 54 N. E. 845, 75 Am. St. Rep. 286; *Melendy v. Capen*, 120 Mass. 222; *Hatch v. Hobbs*, 12 Gray (Mass.) 447; *Bent v. Hartshorn*, 1 Metc. (Mass.) 24; *Crittenden v. Fiske*, 46 Mich. 70, 8 N. W. 714, 41 Am. Rep. 146; *HENRY McSHANE CO. v. PADIAN*, 142 N. Y. 207, 36 N. E. 880; *Rindge v. Judson*, 24 N. Y. 64; *Gates v. McKee*, 13 N. Y. 232, 64 Am. Dec. 545; *Crist v. Burlingame*, 62 Barb. (N. Y.) 351; *Lemp v. Armengol*, 86 Tex. 690, 26 S. W. 941; *Douglass v. Reynolds*, 7 Pet. (U.

it was limited to one transaction—while it might have been in the mind of the writer, might be considered too narrow; but the decisions are not uniform as to the second and third constructions. If, in addition to a limit in value, there be a limit in time, probably the last construction—that the guaranty was intended to cover any unpaid balance, not exceeding the amount named—would prevail.<sup>73</sup>

#### CONFLICT OF LAWS.

**94. A contract is construed according to the law of the place where it is to be performed.**

The general rule is that contracts are to be construed according to the law of the place of performance,<sup>74</sup> which is, usually, the place of making;<sup>75</sup> but if a guaranty be written in one state, addressed to another, it will be construed according to the law of the latter,<sup>76</sup> as it is accepted there,<sup>77</sup> and, until acceptance, the contract is not effective.<sup>78</sup>

S.) 113, 8 L. Ed. 626. In *Pratt v. Matthews*, 24 Hun (N. Y.) 386, the payment of coal was guarantied, provided the amount in default should not exceed the sum of \$1,000 at any time. It was held that this provision limited the amount of the guarantor's liability, and was not a condition that the indebtedness should not exceed the amount named.

<sup>73</sup> *First Nat. Bank of Helena v. Waddell*, 74 Ark. 241, 85 S. W. 417 (1905); *Hatch v. Hobbs*, 12 Gray (Mass.) 447. In *Bank of St. Albans v. Smith*, 30 Vt. 148, the principal gave his creditor a note with a surety, due in 10 days, to secure sums already borrowed, as well as future advances. *Held*, that the security was not continuing, and the surety was not liable for advances made after the maturity of the note. See, also, *President of Agawam Bank v. Strever*, 16 Barb. (N. Y.) 82.

<sup>74</sup> *Cowles v. Townsend*, 37 Ala. 77; *Lachman v. Block*, 47 La. Ann. 505, 17 South. 153, 28 L. R. A. 255.

<sup>75</sup> *Howard v. Fletcher*, 59 N. H. 151.

<sup>76</sup> *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Richardson v. Draper*, 23 Hun (N. Y.) 183; *Bell v. Bruen*, 42 U. S. (1 How.) 169, 11 L. Ed. 89.

<sup>77</sup> *Callender, McAuslan & Troup Co. v. Flint*, 187 Mass. 104, 72 N. E. 345.

<sup>78</sup> See ante, § 36.



## CHAPTER V.

RIGHTS AND LIABILITIES AS BETWEEN THE CREDITOR  
AND THE SURETY.

- 95-97. Surety's Liability to Creditor.
- 98-100. Surety's Right to Notice.
- 101. Surety's Rights After Judgment.
- 102-104. Surety's Rights as Affected by Creditor's Ignorance of the Relation.
- 105. Surety Remains Liable by Consenting to Subsequent  
ings between Principal and Creditor.
- 106. Discharge of the Contract—In General.
- 107. By Alteration.
- 108. By an Extension of Time.
- 109-110. Termination of Liability by Expiration of Time.
- 111-112. Surety's Right to Terminate Contract.
- 113-115. Successive Bonds.
- 116. Surety's Liability Terminated by Default of Principal.
- 117-121. Termination of Liability by Change in Number of Parties  
or by Death.
- 122. Discharge of Surety by Performance.
- 123. Performance Prevented by Creditor or Obligor.
- 124. Beginning of Surety's Liability.
- 125. Compliance with Conditions.
- 126. Guaranties of Collection.
- 127. Surety Discharged by Relinquishment or Loss of Security.
- 128. Surety's Liability as Affected by Liability of Principal.
- 129. Surety's Liability as Affected by Destruction of Property.
- 130-131. Personal Defenses.
- 132. Discharge by Payment, Tender, Release, or Failure of  
Consideration.
- 133. Discharge by Duress, Fraud, or Illegality in the Principal's  
Contract.
- 134. Waiver of Defenses.
- 135. To Whom Surety is Liable.
- 136-141. Estoppel of Surety.
- 142. Surety Discharged by Creditor's Promise to Resort to Prin-  
cipal.
- 143. Surety Discharged by Information that Debt is Paid.
- 144-147. Amount for which Surety Liable.
- 148. Surety's Right to Assert Counterclaims.
- 149-150. Action Against Surety.
- 151-152. Subrogation.

**SURETY LIABLE AS PRINCIPAL.**

95. A surety, whether jointly bound or not, is liable to the creditor or obligee to an extent similar to that of the principal.

**CREDITOR NOT REQUIRED TO PROCEED FIRST AGAINST PRINCIPAL.**

96. The creditor, before proceeding against the surety, is not required to proceed against the principal; nor to resort to any security for the debt which he may hold.

**CHANCERY MAY COMPEL CREDITOR TO RESORT FIRST TO PRINCIPAL.**

97. In certain cases a court of equity will compel the creditor to resort first to the principal.

**LIABILITY OF SURETY NOT AFFECTED BY LACK OF NOTICE OR OF DEMAND NOR BY DELAY.**

98. A surety generally is not entitled to notice of default, nor to demand for performance; nor is his liability generally affected by any delay on the part of the creditor or obligee.

**EXCEPTIONS.**

99. The above rules do not apply—
- (a) If there is a provision to the contrary—
    - (1) In the contract itself, express or implied.
    - (2) In a statute.
  - (b) In a guaranty, where the extent of the liability of the guarantor depends upon the option of the creditor, and the facts are within his knowledge, the guarantor is entitled to reasonable notice of the amount of his liability, and of the default of the principal, unless he has waived notice, or injury has not resulted from lack thereof.

**FORM OF NOTICE WHEN REQUIRED.**

**100. Where notice to a surety is requisite, it need not be given in any particular form.**

It is purposed, in this chapter, to treat of the respective rights and liabilities of the surety and of the creditor or obligee. Their rights and liabilities, as to each other, are not affected by the fact that the surety has received compensation for entering into his contract, and has made a business of entering into such contracts, though in such cases the surety usually takes the precaution to enlarge his rights and restrict his liabilities by express terms in the contract.<sup>1</sup>

The general rule is that the liability of a surety is measured by that of the principal;<sup>2</sup> though, as has been shown, a surety, when entering into the contract, may assume expressly a less or even a greater liability.<sup>3</sup>

*Creditor Not Required to Proceed against Principal.*

Upon default in the performance of the contract, the creditor or obligee is at liberty to ignore the principal entirely, and to proceed at once against the surety.<sup>4</sup> The surety should

<sup>1</sup> Stearns, *Law of Suretyship*, p. 447.

<sup>2</sup> *Crane v. Andrews*, 10 Colo. 265, 15 Pac. 331; *Gage v. Lewis*, 68 Ill. 604; *Goltra v. People*, 53 Ill. 224; *People v. Morrison*, 75 Mich. 30, 42 N. W. 531; *State, to Use of Betts, v. Purdy*, 67 Mo. 89; *Judge of Probate v. Sulloway*, 68 N. H. 511, 44 Atl. 720, 49 L. R. A. 347, 73 Am. St. Rep. 619; *Winchell v. Doty*, 15 Hun. (N. Y.) 1; *St. Albans Bank v. Dillon*, 30 Vt. 122, 73 Am. Dec. 295.

<sup>3</sup> *Smith v. Rogers*, 14 Ind. 224. See ante, § 48.

<sup>4</sup> *Hunt v. Burton*, 18 Ark. 188; *Nickerson v. Chatterton*, 7 Cal. 568; *Governor, to Use of Hannah, v. Perkins*, 2 Bibb (Ky.) 395; *Levy v. Cohen*, 103 App. Div. 195, 92 N. Y. Supp. 1074, reversing 45 Misc. Rep. 95, 91 N. Y. Supp. 594; *Cowan v. Roberts*, 134 N. C. 415, 46 S. E. 979, 65 L. R. A. 729, 101 Am. St. Rep. 845; *CAMPBELL v. SHERMAN*, 151 Pa. 70, 25 Atl. 35, 31 Am. St. Rep. 735; *Roberts v. Riddle*, 79 Pa. 468; *Day v. Elmore*, 4 Wis. 190. Likewise, the creditor may proceed at once against a supplemental surety. *CHESTER v. BRODERICK*, 131 N. Y. 549, 30 N. E. 507. Or against a guarantor. *Donley v. Camp*, 22 Ala. 659, 58 Am. Dec. 274; *London, Paris, & American Bank v. Smith*, 101 Cal. 415, 35 Pac. 1027; *Penny v. Crane Co.*, 80 Ill. 244; *Rich v. Hathaway*, 18 Ill. 548; *Jain v. Giffin*, 3 Colo. App. 90, 32 Pac. 80; *Manry v. Wexelbaum*, 108 Ga. 14, 33

pay the debt, and then, as will be seen in a subsequent chapter, he will have a right to proceed against the principal.<sup>5</sup> If the liability of the principal and surety to the creditor be joint, but not several, the creditor should join them in one action; but, if their liability be joint and several, the creditor may proceed against the surety alone,<sup>6</sup> or, if there be two or more sureties, either of the sureties may be proceeded against,<sup>7</sup> leaving him to adjust his rights afterwards by contribution from his co-sureties.<sup>8</sup>

If the liability of the principal and surety is not joint, as in the case of a guarantor, the fact that the creditor has resorted in the first instance to the principal does not interfere

S. E. 701; *Taylor v. Taylor*, 64 Ind. 356; *German Sav. Bank v. Drake* (Iowa) 79 N. W. 121; *Louisiana & W. R. Co. v. Dillard*, 51 La. Ann. 1484, 26 South. 451; *Prentiss v. Garland*, 64 Me. 155; *Roberts v. Hawkins*, 70 Mich. 566, 38 N. W. 575; *Inkster v. First Nat. Bank*, 30 Mich. 143; *Osborne & Co. v. Gullikson*, 64 Minn. 218, 66 N. W. 965; *Flenham v. Steward*, 45 Neb. 640, 63 N. W. 924; *Allen v. Bantel*, 2 Thomp. & C. (N. Y.) 342; *Loos v. McCormack*, 93 N. Y. Supp. 1088, 46 Misc. Rep. 144; *Clay v. Edgerton*, 19 Ohio St. 549, 2 Am. Rep. 422; *Klein v. Kern*, 94 Tenn. (10 Pickle) 34, 28 S. W. 295; *McCormick Harvesting Mach. Co. v. Millett* (Tex. Civ. App.) 29 S. W. 80; *Woodstock Bank v. Downer*, 27 Vt. 539. The creditor is not obliged first to present his claim against a deceased principal's estate. *Chaffee v. Hooper*, 54 Vt. 513. In Pennsylvania the creditor must proceed against the principal before resorting to a guarantor of payment, the same as against a guarantor of collection. *McIntosh-Huntington Co. v. Reed* (C. C.) 89 Fed. 464. See post, § 126.

<sup>5</sup> See post, § 154.

<sup>6</sup> *Brooks v. Carter*, 36 Ala. 682; *Berg v. Radcliff*, 6 Johns. Ch. (N. Y.) 302; *Domestic Sewing Mach. Co. v. Saylor*, 86 Pa. 287; *Lowndes v. Pinckney*, 2 Strob. Eq. (S. C.) 44.

<sup>7</sup> *Wheeler v. Rohrer*, 21 Ind. App. 477, 52 N. E. 780. If there are two or more bonds, the obligee can resort to the sureties on either (*Pinkstaff v. People*, 59 Ill. 148; *Smith v. Whitten*, 117 N. C. 389, 23 S. E. 320); and if the sureties on one bond limit the amount of their respective liabilities, each can be held singly up to the amount for which he is individually liable. *ELLIS v. EMANUEL*, 1 Exch. 157. In Louisiana, under the Code, the creditor must reduce his demand to the share of each surety. *John M. Parker & Co. v. Guillot*, (La. 1907) 42 South. 782.

<sup>8</sup> See post, § 163.

with his remedy against the guarantor;<sup>9</sup> the creditor, of course, being entitled to but one satisfaction of his claim.<sup>10</sup>

The right of the creditor to resort to the surety without first seeking to enforce his claim against the principal is not affected by the fact that it may interfere with other creditors of the surety.<sup>11</sup> If such other creditors wish to avail themselves of the liability of the principal, let them garnish the principal for the amount he is owing his surety after the latter has been compelled to pay the debt.

*Creditor Not Required to Resort to Security.*

The right of a creditor to resort first to the surety is not affected by the fact that the principal has given the former indemnity for the debt,<sup>12</sup> such as a mortgage,<sup>13</sup> or pledge;<sup>14</sup>

<sup>9</sup> *Towns v. Hicks*, 6 Ga. 239; *State ex rel. Griswold v. Roberts*, 40 Ind. 451; *Sanders v. Forgasson*, 62 Tenn. (3 Baxt.) 249; *Tuton v. Thayer*, 47 How. Prac. (N. Y.) 180.

<sup>10</sup> *Garey v. Hignutt*, 82 Md. 552; *Muscatine v. Mississippi Co.*, 1 Dill. (U. S.) 536, Fed. Cas. No. 9,971.

<sup>11</sup> *Webber v. Webber*, 109 Mich. 147, 66 N. W. 960.

<sup>12</sup> *Penny v. Crane Co.*, 80 Ill. 244; *Trustees of the Presbyterian Board of Publication and Sabbath-School Work v. Gilliford*, 139 Ind. 524, 38 N. E. 404; *Brengle v. Bushey*, 40 Md. 141, 17 Am. Rep. 586; *Allen v. Woodard*, 125 Mass. 400, 28 Am. Rep. 250; *Sigourney v. Wetherell*, 47 Mass. (6 Metc.) 553; *Wade v. Staunton*, 5 How. (Miss.) 631; *Queens County Bank v. Leavitt*, 56 Hun, 647, 10 N. Y. Supp. 194; *First Nat. Bank of Buffalo v. Wood*, 71 N. Y. 405, 27 Am. Rep. 66; *Stone v. Rockefeller*, 29 Ohio St. 625; *Ege v. Barnitz*, 8 Pa. 304; *Thurston v. James*, 6 R. I. 103; *Miller v. Knight*, 66 Tenn. (7 Baxt.) 127; *Cruger v. Burke*, 11 Tex. 694; *Austin v. Curlls*, 31 Vt. 64; *Morley v. Inglis*, 4 Bing. N. C. 58, 5 Scott, 314; 25 Cent. Dig. col. 195. Nor is the creditor obliged to enforce security although requested to do so. *Haden v. Brown*, 18 Ala. 641. Sometimes, by statute, the creditor must resort first to security. *Philadelphia & R. R. Co. v. Little*, 41 N. J. Eq. 519, 7 Atl. 356. It is no defense to a surety that a co-surety has been indemnified by the principal. *Glasscock v. Hamilton*, 62 Tex. 143.

<sup>13</sup> *Maledon v. Leflore*, 62 Ark. 387, 35 S. W. 1102; *Jones v. Tincher*, 15 Ind. 308, 77 Am. Dec. 92; *Webber v. Webber*, 109 Mich. 147, 66 N. W. 960.

<sup>14</sup> The creditor is not obliged to resort to a pledge in his hands, although delay may result in a depreciation thereof. *Freehold Nat. Banking Co. v. Brick*, 37 N. J. Law, 307; *Campbell v. Macomb*, 4 Johns. Ch. (N. Y.) 534; *Cherry v. Miller*, 7 Lea. (Tenn.) 305.

or that the creditor holds a lien<sup>15</sup> upon the property of the principal.<sup>16</sup> The creditor is required to resort no more to the property of the principal than to the principal himself. If the surety desires the enforcement of such collateral security, let him pay the debt, and then he will be subrogated to such securities, and can enforce them.<sup>17</sup>

*Exoneration in Equity.*

Equity will interpose, for good cause shown, and compel the creditor to have recourse on the principal,<sup>18</sup> or to property of the principal in the creditor's hands,<sup>19</sup> or in the hands

<sup>15</sup> Kindt, Appeal of, 102 Pa. 441.

<sup>16</sup> A surety for a lessee cannot compel the lessor to distrain. Brooks v. Carter, 36 Ala. 682; Hall v. Hoxsey, 84 Ill. 616. Nor to pursue collateral remedies. Brown v. Brown, 17 Ind. 475. Sometimes, by statute, the creditor is obliged to levy upon the property of the principal first. Knode v. Baldridge, 73 Ind. 54; Johnson v. Harris, 69 Ind. 305; Folger v. Palmer, 35 La. Ann. 814; Lee v. Griffin, 31 Miss. 632.

<sup>17</sup> Osborne v. Smith (C. C.) 18 Fed. 126. See post, § 151.

<sup>18</sup> Miller v. Stout, 5 Del. Ch. 259; Hayden v. Thrasher, 18 Fla. 795; Macfie v. Kilanea, 6 Haw. 440; Street v. Chicago Co., 157 Ill. 605, 41 N. E. 1108; Keach v. Hamilton, 84 Ill. App. 413; Hoppes v. Hoppes, 123 Ind. 397, 24 N. E. 139; City of Keokuk v. Love, 31 Iowa, 119; Meador v. Meador, 88 Ky. 217, 10 S. W. 651; Philadelphia & R. R. Co. v. Little, 41 N. J. Eq. 519, 7 Atl. 356; MARSH v. PIKE, 10 Paige (N. Y.) 595; King v. Baldwin, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; Thigpen v. Price, 62 N. C. 146; Hale v. Wetmore, 4 Ohio St. 600; Beaver v. Beaver, 23 Pa. 167; Norton v. Reid, 11 S. C. 593; Bishop v. Day, 13 Vt. 81, 37 Am. Dec. 582; Neal v. Buffington, 42 W. Va. 327, 26 S. E. 172; DOBIE v. FIDELITY CO., 95 Wis. 540, 70 N. W. 482, 60 Am. St. Rep. 135; Wooldridge v. Norris, L. R., 6 Eq. 410. See, also, BEARDMORE v. CRUTTENDEN, Cooke, Bankr. Laws (8th Ed.) 232. After the death of the principal, the surety has the same right in regard to the executor of the principal. Stephenson v. Taverners, 9 Grat. (Va.) 398.

<sup>19</sup> Kidd v. Hurley, 54 N. J. Eq. 177, 33 Atl. 1057; HAYS v. WARD, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; Wright v. Austin, 58 Barb. (N. Y.) 13. So the creditor may be compelled to enforce a lien. Polk v. Gallant, 22 N. C. 395, 34 Am. Dec. 410; Henry v. Compton, 2 Head (Tenn.) 549. A creditor will not be compelled to resort to collateral security, unless it is as available as a proceeding against the surety would be. Gary v. Cannon, 38 N. C. 64.

of third persons,<sup>20</sup> before resorting to the surety,<sup>21</sup> or to the property of the latter,<sup>22</sup> it being unreasonable that a man should have such a cloud always hanging over him; \* but this action is limited, generally, to cases where the instrument discloses the relation,<sup>23</sup> and where it works no hardship upon the creditor, and would work a hardship upon the surety if the creditor were to proceed directly against the surety. To such suits the principal and creditor are made parties; and the surety must agree to indemnify the creditor against loss,<sup>24</sup> and offer to pay whatever the principal may fail to pay.<sup>25</sup>

*Surety Not Entitled to Notice of Principal's Default.*

As a general rule, a surety is not entitled to any notice of default of the principal,<sup>26</sup> for a default by the principal is

<sup>20</sup> *Anderson v. Walton*, 35 Ga. 202; *Daniel v. Joyner*, 38 N. C. 513; *McConnell v. Scott*, 15 Ohio, 401, 45 Am. Dec. 583. So the creditor may be compelled to enforce a lien held by a co-surety. *West v. Belches*, 5 Munf. (Va.) 187.

<sup>21</sup> *Fetter*, Eq. p. 253.

<sup>22</sup> *HOPPES v. HOPPES*, 123 Ind. 397, 24 N. E. 139; *Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. Rep. 90; *Vartie v. Underwood*, 18 Barb. (N. Y.) 561; *James v. Jacques*, 26 Tex. 320, 82 Am. Dec. 613.

\* *RANELAUGH v. HAYES*, 1 Vern. 189.

<sup>23</sup> A retired partner may compel the continuing partners, who have assumed the debt, to pay it. *West v. Chasten*, 12 Fla. 315.

<sup>24</sup> *Rice v. Downing*, 12 B. Mon. (Ky.) 44; *Whitridge v. Durkee*, 2 Md. Ch. 442; *Huey v. Pinney*, 5 Minn. 310 (Gil. 246); *Thompson v. Taylor*, 72 N. Y. 32; *HAYS v. WARD*, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; *Gilliam v. Esselman*, 5 Sneed (Tenn.) 86; *Hogaboom v. Herrick*, 4 Vt. 131; *Kent v. Matthews*, 12 Leigh (Va.) 573.

<sup>25</sup> *In re Babcock*, 3 Story (U. S.) 393, Fed. Cas. No. 696.

<sup>26</sup> *First Nat. Bank of San Diego v. Babcock*, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94; *Boyd v. Agricultural Ins. Co.*, 20 Colo. App. 28, 75 Pac. 986; *Gage v. Lewis*, 68 Ill. 604; *Kirby v. Studebaker*, 15 Ind. 45; *Peck v. Frink*, 10 Iowa, 193, 74 Am. Dec. 384; *Dougherty v. Peters*, 2 Rob. (La.) 534; *Read v. Cutts*, 7 Greenl. (Me.) 186, 22 Am. Dec. 184; *Hudson v. Miles*, 185 Mass. 582, 71 N. E. 63, 102 Am. St. Rep. 370; *WATERTOWN FIRE INS. CO. v. SIMMONS*, 131 Mass. 85, 41 Am. Rep. 196; *Welch v. Walsh*, 177 Mass. 555, 59 N. E. 440, 52 L. R. A. 782; *Protection Ins. Co. v. Davis*, 5 Allen (Mass.) 54; *Pleasantville Mut. Loan & Building Society v. Moore*, (N. J. Err. & App. 1904) 57 Atl. 1034; *CASS v. SHEWMAN*, 61 Hun, 472, 16 N. Y. Supp. 236; *Manufacturers' & Merchants' Bank v. Follett*, 11

a default by the surety, and he has no right to throw the burden upon the creditor or obligee, to inform him of his own defaults. If the liability is upon a sum of money due at a certain time, he knows when that time arrives as well as the creditor does; and this is particularly so if he is a surety in the narrower sense—jointly liable with the principal. If the surety has become responsible for the proper performance of duties by his principal, he must ascertain whether the principal is performing such duties properly.<sup>27</sup> The surety has

R. I. 92, 23 Am. Rep. 418; *Dallas Homestead & Loan Ass'n v. Thomas*, 36 Tex. Civ. App. 268, 81 S. W. 1041; *Ford v. Mitchell*, 15 Wis. 304. A guarantor is not entitled to notice of default. *Donley v. Camp*, 22 Ala. 659, 58 Am. Dec. 274; *Lane v. Levillian*, 4 Ark. (4 Pike) 76, 37 Am. Dec. 769; *First Nat. Bank of San Diego v. Babcock*, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94; *Tyler v. Waddingham*, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 637; *Gammell v. Parramore*, 58 Ga. 54; *Taussig v. Reid*, 145 Ill. 488, 32 N. E. 918, 36 Am. St. Rep. 504; *Voltz v. Harris*, 40 Ill. 155; *Nading v. McGregor*, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686; *Levi v. Mendell*, 1 Duv. (Ky.) 77; *Gasquet v. Thorn*, 14 La. 506; *ROBERTS v. HAWKINS*, 70 Mich. 566, 38 N. W. 575; *HUNGERFORD v. O'BRIEN*, 37 Minn. 306, 34 N. W. 161; *Baker v. Kelly*, 41 Miss. 696, 93 Am. Dec. 274; *Barker v. Scudder*, 56 Mo. 272; *Flenham v. Steward*, 45 Neb. 640, 63 N. W. 924; *Bank of Newbury v. Sinclair*, 60 N. H. 100, 49 Am. Rep. 307; *Sibley's Ex'rs v. Stull*, 15 N. J. Law (3 J. S. Green) 332; *Brown v. Curtiss*, 2 N. Y. 225; *Bartholomew v. Seaman*, 25 Hun (N. Y.) 619; *Castle v. Rickly*, 44 Ohio St. 490, 9 N. E. 136, 58 Am. Rep. 839; *Weller v. Henarie*, 15 Or. 28, 13 Pac. 614; *Ruberg v. Brown*, 71 S. C. 287, 51 S. E. 96; *Hunter v. Dickinson*, 29 Tenn. (10 Humph.) 37; *Woodstock Bank v. Downer*, 27 Vt. 539, 65 Am. Dec. 210; *Austin v. Richardson*, 3 Call. (Va.) 201, 2 Am. Dec. 543; *Hoover v. McCormick*, 84 Wis. 215, 54 N. W. 505; *BROOKBANK v. TAYLOR*, Cro. Jac. 685. See ante, §§ 13, 14. As the payee of a note is not bound to notify a surety thereon of the default of the principal, an agreement with the latter not to notify the surety will not be such fraudulent concealment as will discharge the surety. *Grover v. Hoppock*, 26 N. J. Law (2 Dutch.) 191. In some jurisdictions, delay by the creditor in notifying the guarantor of the default of the principal will discharge the guarantor to the extent of the damage due to such delay. *Martyn v. Lamar*, 75 Iowa, 235, 39 N. W. 285; *Picket v. Hawes*, 14 Iowa, 460; *Withers v. Berry*, 25 Kan. 373; *Globe Bank v. Small*, 25 Me. 366; *Talbot v. Gay*, 18 Pick. (Mass.) 534; *Farrow v. Respass*, 33 N. C. 170.

<sup>27</sup> *Pickering v. Day*, 3 Houst. (Del.) 474, 95 Am. Dec. 291; *Tapley v. Martin*, 116 Mass. 275.



undertaken to perform a contract, and must perform it.<sup>28</sup> It is true that in many cases the creditor or obligee is in a better position to know of the defaults of the principal than the surety is; but that does not affect the rule.

*Surety Not Entitled to Demand.*

Likewise, demand need not be made upon the principal;<sup>29</sup> nor upon a surety if no demand upon the principal be necessary.<sup>30</sup> The bringing of the suit is a sufficient demand.<sup>31</sup> Nor is the guarantor of a note entitled to have demand made of the principal.<sup>32</sup>

*Surety Not Discharged by Delay.*

A surety cannot set up the delay of the creditor or obligee to seek enforcement of his claim as a defense when the cred-

<sup>28</sup> Bulkley v. Finch, 37 Conn. 71.

<sup>29</sup> Coburn v. Brooks, 78 Cal. 443, 21 Pac. 2; Bolles v. Bird, 12 Colo. App. 78, 54 Pac. 403; Higgins v. State, 87 Ind. 282; Fowler v. Gordon, 5 Ky. Law Rep. 332; County of Redwood v. Tower, 28 Minn. 45, 8 N. W. 907; Nelson v. Donovan, 16 Mont. 85, 40 Pac. 72; Bell v. Walker, 54 Neb. 222, 74 N. W. 617; Rosendorf v. Mandel, 18 Nev. 129, 1 Pac. 672; Teel v. Tice, 14 N. J. Law, 444.

<sup>30</sup> Hough v. Aetna Ins. Co., 57 Ill. 318, 11 Am. Rep. 18; Grocers' Bank, President, Directors, etc., v. Klingman, 16 Gray (Mass.) 473. See ante, § 13.

<sup>31</sup> Mitchell v. Williamson, 6 Md. 210; Carr v. Card, 34 Mo. 513.

<sup>32</sup> Lane v. Levillian, 4 Ark. (4 Pike) 76, 37 Am. Dec. 769; First Nat. Bank of San Diego v. Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94; City Sav. Bank v. Hopson, 53 Conn. 453, 5 Atl. 601; Gage v. Mechanics' Nat. Bank, 79 Ill. 62; Taylor v. Taylor, 64 Ind. 356; Peck v. Frink, 10 Iowa, 193, 74 Am. Dec. 384; Lowe v. Beckwith, 53 Ky. (14 B. Mon.) 184, 58 Am. Dec. 659; Read v. Cutts, 7 Me. (7 Greenl.) 186, 22 Am. Dec. 184; Parkman v. Brewster, 81 Mass. (15 Gray) 271; Baker v. Kelly, 41 Miss. 696, 93 Am. Dec. 274; Wright v. Dyer, 48 Mo. 525; Bloom v. Warder, 13 Neb. 476, 14 N. W. 395; Quillen v. Quigley, 14 Nev. 215; Bank of Newbury v. Sinclair, 60 N. H. 100, 49 Am. Rep. 307; Winchell v. Doty, 15 Hun (N. Y.) 1; Allen v. Rightmere, 20 Johns. (N. Y.) 365, 11 Am. Dec. 288; Gardner v. King, 24 N. C. (2 Ired.) 297; Castle v. Rickly, 44 Ohio St. 490, 9 N. E. 130, 58 Am. Rep. 839; Weller v. Henarie, 15 Or. 28, 13 Pac. 614; Carroll County Sav. Bank v. Strother, 28 S. C. 504, 6 S. E. 313; Klein v. Kern, 94 Tenn. (10 Pickle) 34, 28 S. W. 295; Partridge v. Davis, 20 Vt. 499; Pasteur v. Parker, 3 Rand. (Va.) 458; Ten Eyck v. Brown, 3 Pin. (Wis.) 452; Evans v. Cleveland & P. R. Co., Fed. Cas. No. 4,557. See ante, § 14.

itor proceeds against him.<sup>83</sup> The neglect is his as much as that of the creditor.<sup>84</sup> If the surety knew, or had means of

<sup>83</sup> *Buckalew v. Smith*, 44 Ala. 638; *King v. State Bank*, 9 Ark. (4 Eng.) 185, 47 Am. Dec. 739; *Humphreys v. Crane*, 5 Cal. 173; *Clark v. Gerstley*, 28 App. D. C. 205; *Dorman v. Bigelow*, 1 Fla. (Branch) 281; *Crawford v. Gauden*, 33 Ga. 173; *Lyle v. Morse*, 24 Ill. 95; *Kirby v. Studebaker*, 15 Ind. 45; *Stout v. Ashton*, 21 Ky. (5 T. B. Mon.) 251; *Pharr v. McHugh*, 32 La. Ann. 1280; *Stowell v. Goodenow*, 31 Me. 538; *Sasscer v. Young*, 6 Gill & J. (Md.) 243; *WATERTOWN FIRE INS. CO. v. SIMMONS*, 131 Mass. 85, 41 Am. Rep. 196; *Hunt v. Bridgham*, 19 Mass. (2 Pick.) 581, 13 Am. Dec. 458; *ROBERTS v. HAWKINS*, 70 Mich. 566, 38 N. W. 575; *HUNGERFORD v. O'BRIEN*, 37 Minn. 306, 34 N. W. 161; *Huey v. Pinney*, 5 Minn. 310 (Gill. 246); *Wright v. Watt*, 52 Miss. 634; *Hawkins v. Ridenhour*, 13 Mo. 125; *Clark v. Sickler*, 64 N. Y. 231, 21 Am. Rep. 606; *People v. White*, 28 Hun (N. Y.) 289; *Carter v. Jones*, 40 N. C. 196, 49 Am. Dec. 425; *Newton v. Hammond*, 38 Ohio St. 430; *Edwards v. Dargan*, 30 S. C. 177, 8 S. E. 858; *Johnston v. Searcy*, 12 Tenn. (4 Yerg.) 182; *Hunter v. Clark*, 28 Tex. 159; *Knight v. Charter*, 22 W. Va. 422; *Hunt v. United States*, 1 Gall. (U. S.) 32, Fed. Cas. No. 6,900; 40 Cent. Dig. col. 2020. In *Coleman v. Stone*, 85 Va. 386, 7 S. E. 241, the delay was 25 years. A guarantor is not discharged by the delay of the creditor. *English v. Landon*, 181 Ill. 614, 54 N. E. 911; *Hooker v. Gooding*, 86 Ill. 60; *Peterson v. Russell*, 62 Minn. 220, 64 N. W. 555, 29 L. R. A. 612, 54 Am. St. Rep. 634; *D. M. Osborne & Co. v. Lawson*, 26 Mo. App. 549; *Bloom v. Warder*, 13 Neb. 476, 14 N. W. 395; *Noxon v. Bentley*, 7 How. Prac. (N. Y.) 316; *Foster v. Tolleson*, 13 Rich. Law (S. O.) 31; *Irvine v. Brasfield*, 57 Tenn. (10 Helsk.) 425. In Pennsylvania a guarantor of payment when due, is not discharged by lack of diligence on the part of the creditor. *Korn v. Hohl*, 80 Pa. 333; *Girard Life Ins. Co. v. Finley*, 1 Phila. (Pa.) 70. Though it is otherwise as to a guarantor of payment generally. *Tissue v. Hanna*, 158 Pa. 384, 27 Atl. 1104; *Johnston v. Chapman*, 3 Pen. & W. (Pa.) 18.

A guarantor would not be discharged, though the delay be at the request of the creditor. *CLARK v. SICKLER*, 64 N. Y. 231, 21 Am. Rep. 606.

A surety is not discharged by delay of the creditor in presenting his claim against the estate of a deceased principal until it is too late to have it allowed. *Minter v. Branch Bank*, 23 Ala. 762, 58 Am. Dec. 315; *Smith v. Smithson*, 48 Ark. 261, 3 S. W. 49; *Bull v. Coe*, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235; *Jackson v. Benson*, 54 Iowa. 654, 7 N. W. 97; *Halderman v. Woodward*, 22 Kan. 734; *Mitchell v. Williamson*, 6 Md. 210; *Johnson v. Planters' Bank*, 12 Miss. (4 Smedes & M.) 165, 43 Am. Dec. 480; *Cain v. Bates*,

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<sup>84</sup> *Herrick v. Borst*, 4 Hill (N. Y.) 650.

ascertaining, when the principal was in default, it was his duty to settle the claim at once, as it was against such default that he contracted. If there was any probability of his being injured by delay, he should have paid the debt, as he had undertaken to do, and seek redress from his principal.<sup>85</sup> The delay of the creditor, instead of working an injury to him, would be supposed to be to his advantage. After suit is brought by the creditor against the principal, mere continuance of such suit will not affect the surety's rights, as his position as to the creditor or principal is not affected thereby any more than it was before the bringing of the suit.<sup>86</sup>

*Express Stipulations.*

Each of these rights of the creditor or obligee against the surety may be taken away by a term in the contract. A party to a contract is at liberty to make any contract he pleases, so long as it does not infringe any rule of law; and, if the surety expressly stipulate that the creditor shall resort first to the principal,<sup>87</sup> or to security which the creditor holds,<sup>88</sup> or that notice shall be given of the principal's default,<sup>89</sup> and de-

35 Mo. 427; Boardman v. Paige, 11 N. H. 437; Moore v. Gray, 26 Ohio St. 525; Planters' & Mechanics' Nat. Bank of Houston v. Robertson (Tex. Civ. App. 1905) 86 S. W. 643. In some states this has been changed by statute. Waughop v. Bartlett, 165 Ill. 124, 46 N. E. 197.

The creditor is not obliged to present his claim to an assignee for the benefit of the principal's creditors. Dye v. Dye, 21 Ohio St. 86, 8 Am. Rep. 40.

Where an indorser's liability has been fixed by demand, notice, and protest, he is not discharged by any delay short of the period fixed by the statute of limitations, though the maker may have become insolvent during the delay. Rogers v. Detroit Sav. Bank (Mich. 1906) 110 N. W. 74, 13 Detroit Leg. N. 889.

<sup>85</sup> See post, § 154.

<sup>86</sup> Eickhoff v. Eickenbary, 52 Neb. 332, 72 N. W. 308; First Nat. Bank of Cumberland v. Parsons, 45 W. Va. 688, 32 S. E. 271.

<sup>87</sup> Salt Springs Nat. Bank v. Sloan, 57 Hun, 265, 11 N. Y. Supp. 32; Eddy v. Stanton, 21 Wend. (N. Y.) 255; Jones v. Greenlaw, 6 Cold. (Tenn.) 342; Dwight v. Williams, 4 McLean (U. S.) 581, Fed. Cas. No. 4,218.

<sup>88</sup> Brainard v. Reynolds, 36 Vt. 614.

<sup>89</sup> United States Fidelity & Guaranty Co. v. Rice, 148 Fed. 206, 78 C. C. A. 164.

mand made, he cannot be held liable unless these conditions have been complied with, even though no injury results to the surety from a failure to comply with them.<sup>40</sup>

*Implied Stipulations.*

In some contracts of suretyship the law implies some of these conditions, without their being stipulated for expressly. As we have seen, a guaranty of collection is, in itself, a conditional guaranty, requiring the creditor to exhaust the principal first, and without delay,<sup>41</sup> and he should notify the guarantor of his inability to collect.<sup>42</sup> In the contract of a regular indorser of a negotiable instrument the law requires the creditor to make demand of the principal, and to give notice of default to the indorser; otherwise, he is freed from liability.<sup>43</sup>

If the contract of a surety has been made after the enactment of a statute requiring the obligee to resort first to the principal, the parties are supposed to have contracted with reference to the statute;<sup>44</sup> and in such cases the obligee must resort first to the principal before he can have recourse to the surety.

Statutes of limitation require suit to be brought within a certain time upon contracts named therein, or they become no longer enforceable; and contracts of suretyship come within the provisions of the statute according to the character of the contract. Delay by the creditor or obligee beyond the period fixed in the statute will take away the remedy against the surety.<sup>45</sup>

*Notice to Guarantor of Amount.*

The notice requisite in the case of an offer to guaranty has been considered elsewhere;<sup>46</sup> but notice of acceptance alone

<sup>40</sup> *Hillary v. Rose*, 9 Phila. (Pa.) 139. See post, § 125.

<sup>41</sup> See ante, c. I, note 76, and post, § 126.

<sup>42</sup> Failure to give this notice furnishes no defense to the guarantor, unless he is prejudiced by lack thereof. *Gillighan v. Boardman*, 29 Me. 79; *BRACKETT v. RICH*, 23 Minn. 485, 23 Am. Rep. 703; *Thomas v. Woods*, 4 Cow. (N. Y.) 173; *Bashford v. Shaw*, 4 Ohio St. 263; *Janes v. Scott*, 59 Pa. 178, 98 Am. Dec. 328; *Gibbs v. Cannon*, 9 Serg. & R. 198, 11 Am. Dec. 699; *Benton v. Gibson*, 1 Hill (S. C.) 56; *Sylvester v. Downer*, 18 Vt. 32.

<sup>43</sup> See post, c. VIII, note 14.

<sup>44</sup> See ante, c. IV, note 38.

<sup>45</sup> See post, § 180, b, 2.

<sup>46</sup> Ante, § 37.

is not all that is required in some cases. Where the guaranty is for a single transaction, and the amount<sup>47</sup> or other terms<sup>48</sup> are definite, notice of acceptance will give the guarantor all the information he may require; but, where the guaranty is for future advancements of money or of goods, the guarantor, except by repeated inquiries, is not in a position to know to what extent he may be called upon to respond for the default of his principal, and, in order that he may take the necessary steps to protect himself in his dealings with the principal, the creditor is required to give the guarantor notice of the total amount of credit extended to the principal.<sup>49</sup> It is not requisite to give notice after each separate transaction, but it is sufficient if it be given after all the advancements are made.<sup>50</sup> Notice of the exact amount is not required, but notice of "about" the amount of goods furnished would suffice.<sup>51</sup>

*Notice of Principal's Default.*

In cases of continuing guaranties, where advancements are made to the principal from time to time, notice must be given, not only of the total amount, as stated in the preceding paragraph, but also of the default of the principal.<sup>52</sup> As the negotiations have been solely between the creditor and the principal, the guarantor is ignorant, not only of the amounts, but

<sup>47</sup> *German Sav. Bank v. Drake Roofing Co.*, 112 Iowa, 184, 84 N. W. 960, 51 L. R. A. 758, 84 Am. St. Rep. 335.

<sup>48</sup> *Rushnell v. Church*, 15 Conn. 406; *Kirby v. Studebaker*, 15 Ind. 45.

<sup>49</sup> *Lawson v. Townes*, 2 Ala. 373; *Killian v. Ashley*, 24 Ark. 511, 91 Am. Dec. 519; *Craft v. Isham*, 13 Conn. 28; *SINGER MFG. CO. v. LITTLE*, 56 Iowa, 601, 9 N. W. 905; *Howe v. Nickels*, 22 Me. 175; *Babcock v. Bryant*, 12 Pick. (Mass.) 133; *Whiting v. Stacy*, 15 Gray (Mass.) 270; *Montgomery v. Kellogg*, 43 Miss. 486, 5 Am. Rep. 508; *Beebe v. Dudley*, 26 N. H. 249, 59 Am. Dec. 341; *Bay v. Thompson*, 1 Pears. (Pa.) 551; *Louisville Mfg. Co. v. Welch*, 51 U. S. (10 How.) 461, 13 L. Ed. 497.

<sup>50</sup> *Lowe v. Beckwith*, 14 B. Mon. (Ky.) 150, 58 Am. Dec. 659.

<sup>51</sup> *Noyes v. Nichols*, 28 Vt. 159.

<sup>52</sup> *Walker v. Forbes*, 25 Ala. 139, 60 Am. Dec. 498; *Mayberry v. Balnton*, 2 Har. (Del.) 24; *Milroy v. Quinn*, 69 Ind. 406, 35 Am. Rep. 227; *Stewart v. Knight* (Ind. App. 1904) 71 N. E. 182; *SINGER MFG. CO. v. LITTLE*, 56 Iowa, 601, 9 N. W. 905; *Mussey v. Rayner*, 22 Pick. (Mass.) 228; *Beebe v. Dudley*, 26 N. H. 249, 59 Am. Dec. 341; *Douglass v. Reynolds*, 7 Pet. (U. S.) 113, 8 L. Ed. 626.

of the time payments should be made. While he might ascertain this by inquiries, the law does not throw that burden upon him, but requires that he be given notice of the default of the principal. Such notice must be given in a reasonable time;<sup>53</sup> and what is reasonable depends upon the circumstances, and is a question of fact for the jury.<sup>54</sup>

*Time and Form of Notice.*

As the object of the notice is to enable the guarantor to take steps to protect himself against loss, he is discharged to the extent of the damage sustained only;<sup>55</sup> and, if he has not sustained any loss by reason of such failure, his liability remains.<sup>56</sup> If the principal remain solvent, the guarantor does not sustain any loss, as he can recover from the principal any sums he may be called upon to pay.<sup>57</sup> If the principal were insolvent at the time the contract was made, the guarantor has not suffered loss,<sup>58</sup> for he could not have recovered from

<sup>53</sup> *Cahuzac v. Samini*, 29 Ala. 288; *Ringgold v. Newkirk*, 3 Ark. (3 Pike) 96; *Erwin v. Lamborn*, 1 Har. (Del.) 125; *Furst & Bradley Mfg. Co. v. Black*, 111 Ind. 308, 12 N. E. 504; *Second Nat. Bank of Rockford v. Gaylord*, 34 Iowa, 246; *Allen v. Pike*, 57 Mass. (3 Cush.) 238; *Dole v. Young*, 41 Mass. (24 Pick.) 250; *Brackett v. Rich*, 23 Minn. 485, 23 Am. Rep. 703; *Montgomery v. Kellogg*, 43 Miss. 486, 5 Am. Rep. 508; *Cox v. Brown*, 51 N. C. (6 Jones' Law) 100; *Greene v. Dodge*, 2 Ohio, 430; *Patterson v. Reed*, 7 Watts & S. (Pa.) 144; *Garratt v. Mobile L. Ins. Co.*, 1 White & W. Civ. Cas. Ct. App. § 937; *Bull v. Bliss*, 30 Vt. 127; *Dunbar v. Brown*, 4 McLean (U. S.) 166, Fed. Cas. No. 14,129.

<sup>54</sup> *Jackson v. Yandes*, 7 Blackf. (Ind.) 526; *Wadsworth v. Allen*, 8 Grat. (Va.) 174, 56 Am. Dec. 137.

<sup>55</sup> *Cahuzac v. Samini*, 29 Ala. 288; *McCollum v. Cushing*, 22 Ark. 540; *Mayberry v. Bainton*, 2 Har. (Del.) 24; *Taussig v. Reid*, 145 Ill. 488, 32 N. E. 918, 36 Am. St. Rep. 504; *Davis S. M. Co. v. Mills*, 55 Iowa, 543, 8 N. W. 356; *Howe v. Nickels*, 22 Me. 175; *Bishop v. Eaton*, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437; *Clark v. Remington*, 11 Metc. (Mass.) 361; *Montgomery v. Kellogg*, 43 Miss. 486, 5 Am. Rep. 508; *Rankin v. Childs*, 9 Mo. 673; *UNION BANK OF LOUISIANA v. COSTER*, 3 N. Y. 203, 53 Am. Dec. 280; *Sullivan v. Field*, 118 N. C. 358, 24 S. E. 735; *Reynolds v. Douglass*, 12 Pet. (U. S.) 497, 9 L. Ed. 1171.

<sup>56</sup> *Babcock v. Bryant*, 29 Mass. (12 Pick.) 133; *UNION BANK v. COSTER*, 3 N. Y. 203, 53 Am. Dec. 280.

<sup>57</sup> See post, § 154.

<sup>58</sup> *Walker v. Forbes*, 25 Ala. 139, 60 Am. Dec. 498; *Mayberry v.*

the principal, had he been notified promptly;<sup>59</sup> but if the principal were solvent when the contract was made, and afterwards becomes insolvent, delay in giving notice may involve the guarantor in loss. The notice required need not be formal,<sup>60</sup> nor need it be in writing, but may be inferred from circumstances;<sup>61</sup> or it may be waived, either expressly<sup>62</sup> or impliedly.<sup>63</sup>

#### **SURETY'S RIGHTS NOT AFFECTED BY JUDGMENT.**

##### **101. The rights and liabilities of a surety are not affected by the recovery of a judgment against him.**

The rights and liabilities of a surety are not affected by a judgment obtained by the creditor against him for the debt.<sup>64</sup>

Bainton, 2 Har. (Del.) 24; German Sav. Bank v. Drake Roofing Co., 112 Iowa, 184, 84 N. W. 960, 51 L. R. A. 758, 84 Am. St. Rep. 835; Beebe v. Dudley, 26 N. H. (6 Foster) 249, 59 Am. Dec. 341; Sullivan v. Field, 118 N. C. 358, 24 S. E. 735; Bashford v. Shaw, 4 Ohio St. 263; Janes v. Scott, 59 Pa. (9 P. F. Smith) 178, 98 Am. Dec. 328.

<sup>59</sup> Walker v. Forbes, 25 Ala. 139, 60 Am. Dec. 498; Taussig v. Reid, 145 Ill. 488, 32 N. E. 918, 36 Am. St. Rep. 504; BRACKETT v. RICH, 23 Minn. 485, 23 Am. Rep. 703; Dearborn v. Sawyer, 59 N. H. 95.

<sup>60</sup> Notice is not necessary if the guarantor knows of the principal's default. Benton v. Gibson, 1 Hill Law (S. C.) 56.

<sup>61</sup> Montgomery v. Kellogg, 43 Miss. 486, 5 Am. Rep. 508; Oaks v. Weller, 16 Vt. 70; Reynolds v. Douglass, 12 Pet. (U. S.) 497, 9 L. Ed. 1171.

<sup>62</sup> Bickford v. Gibbs, 8 Cush. (Mass.) 154. Where indebtedness was guarantied "unconditionally at all times," notice of amount was waived expressly. DAVIS v. WELLS, 104 U. S. 164, 26 L. Ed. 686.

<sup>63</sup> If the guarantor acknowledge his liability, notice is not required. Breed v. Hillhouse, 7 Conn. 523.

<sup>64</sup> Carpenter v. Devon, 6 Ala. 718; Curan v. Colbert, 3 Ga. (3 Kelly) 239, 46 Am. Dec. 427; Trotter v. Strong, 63 Ill. 272; Chambers v. Cochran, 18 Iowa, 159; Davis v. Mikkell, 1 Freem. Ch. (Miss.) 548; Rice v. Morton 19 Mo. 263; Bangs v. Strong, 4 N. Y. (4 Comst.) 315; La Farge v. Herter, 11 Barb. (N. Y.) 159; Mortland v. Himes, 8 Pa. (8 Barr) 265; Commonwealth, to Use of Bellas, v. Vanderslice, 8 Serg. & R. (Pa.) 452; Wren v. Peel, 64 Tex. 374; Dunham v. Downer, 31 Vt. 248. The rule is the same as to an indorser. Hubbell v. Carpenter, 5 Barb. (N. Y.) 520.

§ 101) SURETY'S RIGHTS NOT AFFECTED BY JUDGMENT. 147

The only effect of the judgment is to change the form of the obligation;<sup>65</sup> the judgment being, technically, of a higher nature.<sup>66</sup> The rule is the same whether the judgment be obtained against the principal and surety jointly,<sup>67</sup> or against the latter alone.<sup>68</sup> The creditor may satisfy his judgment out of the property of the surety without resorting to the principal;<sup>69</sup> and the rights of the creditor are not affected by a delay in seeking satisfaction of the judgment.<sup>70</sup> The surety, however, while he has the same liability after judgment as he did before, also has the same rights, which the creditor must respect; and any subsequent acts of the creditor which would have discharged the surety before judgment will have a like effect after judgment.<sup>71</sup>

<sup>65</sup> *Davis v. Maynard*, 9 Mass. 242; *Moss v. Pettingill*, 3 Minn. 217 (Gil. 145); *Smith v. Rice*, 27 Mo. 505, 72 Am. Dec. 281; *Bangs v. Strong*, 4 N. Y. 315; *Blazer v. Bundy*, 15 Ohio St. 57; *Commonwealth, to Use of Bellas, v. Vanderslice*, 8 Serg. & R. 452.

<sup>66</sup> *Carpenter v. King*, 9 Metc. (N. Y.) 511, 43 Am. Dec. 405.

<sup>67</sup> *Storms v. Thorn*, 3 Barb. (N. Y.) 314.

<sup>68</sup> *Manufacturers' & Mechanics' Bank v. Bank of Pennsylvania*, 7 Watts & S. (Pa.) 335, 42 Am. Dec. 240.

<sup>69</sup> *Keaton v. Cox*, 26 Ga. 162; *Fuller v. Loring*, 42 Me. 481; *Eason v. Petway*, 18 N. C. 44. See ante, note 16. In some states, by statute, the property of the principal must be levied upon first. *Knobe v. Baldrige*, 73 Ind. 54; St. Ill. c. 103, § 14.

<sup>70</sup> *Summerhill v. Tapp*, 52 Ala. 227; *Lumsden v. Leonard*, 55 Ga. 374; *Jerauld v. Trippet*, 62 Ind. 122; *Manice v. Duncan*, 12 La. Ann. 715. See supra, note 33.

<sup>71</sup> *Brown v. Ayer*, 24 Ga. 288; *Stelle v. Lovejoy*, 125 Ill. 352, 17 N. E. 711; *Green v. Raftes*, 67 Ind. 49; *Ames v. Maclay*, 14 Iowa, 281; *Moss v. Pettingill*, 3 Minn. 217 (Gil. 145); *Davis v. Mikell*, 1 Freem. Ch. (Miss.) 548; *West v. Brison*, 99 Mo. 684, 13 S. W. 95; *Delaplaine v. Hitchcock*, 4 Edw. Ch. (N. Y.) 321; *Commercial Bank of Lake Erie v. Western Reserve Bank*, 11 Ohio, 444, 38 Am. Dec. 739; *Noble v. Oil Co.*, 69 Pa. 409. An extension of time given to the principal after the recovery of a judgment against the surety will discharge the latter. *Carpenter v. Devon*, 6 Ala. 718; *Gipson v. Ogden*, 100 Ind. 20; *Allison v. Thomas*, 29 La. Ann. 732; *State, to Use of Barber, v. Hammond*, 6 Gill & J. (Md.) 157; *Smith v. Rice*, 27 Mo. 505, 72 Am. Dec. 281; *Bangs v. Strong*, 7 Hill (N. Y.) 250, 42 Am. Dec. 64; *Blazer v. Bundy*, 15 Ohio St. 57; *Clippinger v. Creps*, 2 Watts (Pa.) 45; *Pilgrim v. Dykes*, 24 Tex. 383; *Ward v. Johnson*, 6 Munt. (Va.) 6, 8 Am. Dec. 729. So will an extension given to another surety. *Ide v. Churchill*, 14 Ohio St. 372. Or the release of



**CREDITOR MUST HAVE KNOWLEDGE OF THE RELATION  
TO AFFECT A SURETY BY HIS ACTS.**

102. The rights of a surety will not be affected by acts of the creditor or obligee, unless the existence of the relation of principal and surety be known to the creditor or obligee.

**CREDITOR MUST RESPECT RELATION WHEN IN-  
FORMED.**

103. The relation must be respected as soon as knowledge thereof is acquired by the creditor or obligee.

**RELATION MAY BE SHOWN ORALLY.**

104. Oral evidence is competent to show the relation of the parties, except—
- (a) Oral evidence will not be allowed to contradict a written instrument.
  - (b) The relation cannot be shown so as to affect the rights of a purchaser of a negotiable instrument for value without notice.

*Creditor's Ignorance of Relation.*

Where two or more persons are liable upon a contract, the other party thereto is justified in dealing with one of them in regard to some matter which it naturally might be presumed would be for the benefit of all, on the theory that the person dealt with was acting for the others; hence, if two persons upon a contract bear the relation to each other of principal and surety, and that fact be unknown to the creditor, the rights of the creditor against the surety cannot be affected by any subsequent negotiations between the creditor and principal alone.<sup>72</sup> P. and S. buy goods from C. on credit, the trans-

the principal. *Mortland v. Himes*, 8 Pa. (8 Barr) 265; *Ragsdale v. Gossett*, 70 Tenn. (2 Lea) 729.

<sup>72</sup> *Orvis v. Newell*, 17 Conn. 97; *Murray v. Graham*, 29 Iowa, 520, 7 Am. Dec. 494; *Neel v. Harding*, 2 Metc. (Ky.) 247; *Cheesebrough v. Millard*, 1 Johns. Ch. (N. Y.) 409. A surety is not discharged by

action, apparently, being a joint one; but, as between P. and S., it is understood that the goods are for P., and that S. has consented to become an apparent party to the transaction because of the probability that C. would not have sold the goods to P. alone. When the time of credit has expired, P., the principal, unknown to S., goes to C., the creditor, and requests an extension of time, which is granted. S. would not be freed from liability, as he would if C. knew that he was a surety merely.<sup>73</sup>

Where the creditor is aware of the relation,<sup>74</sup> while it is of little importance so far as his right to enforce the contract is concerned,<sup>75</sup> he must exercise great caution as to his acts after the contract is made,<sup>76</sup> and particularly after default,

an extension of time given to the principal by the surety in ignorance of the relation. *Stewart v. Parker*, 55 Ga. 656; *Mullendore v. Wertz*, 75 Ind. 431, 39 Am. Rep. 155; *Morgan v. Thompson*, 60 Iowa, 280, 14 N. W. 306; *Wilson v. Foot*, 52 Mass. (11 Metc.) 285; *Agnew v. Merritt*, 10 Minn. 308 (Gil. 242); *Nichols v. Parsons*, 6 N. H. 30, 23 Am. Dec. 706; *Kaighn v. Fuller*, 14 N. J. Eq. (1 McCarter) 419; *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398; *Roberts v. Bane*, 32 Tex. 385; *Culbertson v. Wilcox*, 11 Wash. 522, 39 Pac. 954; *St. Maries v. Polleys*, 47 Wis. 67, 1 N. W. 389.

<sup>73</sup> See post, § 108.

<sup>74</sup> *Pollard v. Stanton*, 5 Ala. 451; *Taylor v. Scott*, 62 Ga. 39; *Flynn v. Mudd*, 27 Ill. 323; *Gipson v. Ogden*, 100 Ind. 20; *Kelly v. Gillespie*, 12 Iowa, 55, 79 Am. Dec. 516; *Neel v. Harding*, 59 Ky. (2 Metc.) 247; *Adle v. Metoyer*, 1 La. Ann. 254; *Cummings v. Little*, 45 Me. 183; *Yates v. Donaldson*, 5 Md. 389, 61 Am. Dec. 283; *Guild v. Butler*, 127 Mass. 386; *Walter A. Wood Mowing & Reaping Mach. Co. v. Oliver*, 103 Mich. 326, 61 N. W. 507; *Stevens v. Oaks*, 58 Mich. 343, 25 N. W. 309; *Smith v. Freyler*, 4 Mont. 489, 1 Pac. 214, 47 Am. Rep. 358; *Lee v. Brugmann*, 37 Neb. 232, 55 N. W. 1053; *Grafton Bank v. Kent*, 4 N. H. 221, 17 Am. Dec. 414; *Pitts v. Congdon*, 2 N. Y. 352, 51 Am. Dec. 299; *HAYS v. WARD*, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; *First Nat. Bank of Victoria v. Skidmore* (Tex. Civ. App. 1895) 30 S. W. 564; *Peake v. Dorwin*, 25 Vt. 28; *Harmon v. Hale*, 1 Wash. T. 422, 34 Am. Rep. 816; *Irvine v. Adams*, 48 Wis. 468, 4 N. W. 573, 33 Am. Rep. 817; *Scott v. Scruggs*, 60 Fed. 721, 9 C. C. A. 246, 23 U. S. App. 280. The surety must prove that the creditor had knowledge of the relation. *Mullendore v. Wertz*, 75 Ind. 431, 39 Am. Rep. 155.

<sup>75</sup> See ante, § 96.

<sup>76</sup> See post, as to alteration, section 107; extension of time, section 108; and relinquishment of securities, section 127.

or by some act he may injure the surety, and thus discharge him. The rule is the same, whether the relation is that of a surety in the narrow sense, or whether the suretyship results by operation of law.<sup>77</sup>

*Subsequent Knowledge of Relation.*

The creditor is bound to respect the relation as soon as he is aware of it.<sup>78</sup> The rule is the same where the creditor is aware of the relation as originally existing, and the principal and surety, by subsequent dealings between themselves, have changed the relation.<sup>79</sup> As soon as the creditor reasonably is informed that a party bound to him is a surety for another party also bound to him, he is required to respect the relation.<sup>80</sup>

*What Constitutes Notice.*

If there are two or more signatures to a promissory note, there is no presumption that one or more of the signers are sureties; or, if some are sureties, that the first signer is necessarily the principal.<sup>81</sup> The original payee of a note may be presumed to know that one of the parties to it was a principal, if all of the money for which such note was given, was paid by the creditor to such person;<sup>82</sup> but a subsequent hold-

<sup>77</sup> Home Nat. Bank of Chicago v. Waterman, 134 Ill. 461, 29 N. E. 503; Wayman v. Jones, 58 Mo. App. 313.

<sup>78</sup> Lauman v. Nichols, 15 Iowa, 161; Guild v. Butler, 127 Mass. 386; SMITH v. SHELDEN, 35 Mich. 42, 24 Am. Rep. 529; O'Howell v. Kirk, 41 Mo. App. 523; Wheat v. Kendall, 6 N. H. 504; Colgrove v. Tallman, 2 Lans. (N. Y.) 97; Overend, Gurney & Co. v. Oriental Corp., L. R. 7 H. L. 348.

<sup>79</sup> See ante, § 68.

<sup>80</sup> If a creditor of a firm is aware that certain of the partners have assumed the firm debts, he must recognize, in dealing with such partners thereafter, the relation of surety sustained by the other partners. Preston v. Garrard, 120 Ga. 689, 48 S. E. 118; SMITH v. SHELDEN, 35 Mich. 42, 24 Am. Rep. 529; Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90; Millard v. Thorn, 56 N. Y. 402; ROUSE v. BRADFORD BANKING CO., [1894] App. Cas. 586.

<sup>81</sup> Summerhill v. Tapp, 52 Ala. 227; Paul v. Berry, 78 Ill. 158.

<sup>82</sup> Ward v. Stout, 32 Ill. 399; Champion v. Robertson, 67 Ky. (4 Bush) 17; Cummings v. Little, 45 Me. 183. Where one obligor makes payments, and is resorted to by the obligee, and another obligor does not make payments, and is not called upon by the obligee, a strong presumption is raised that the former is a principal, and the other a surety. Doughty v. Bacot, 2 Desaus. (S. C.) 546.

er could not be presumed to know. If, at the time the holder of a note discounts it, he is told of the relation, there is no question as to his knowledge.

The creditor will be held to have constructive notice of anything which appears upon the instrument itself, whether he has read it or not; and if the relation is expressly stated in the instrument, that is sufficient.<sup>83</sup> Where a mortgage to secure a debt of a husband is signed by the husband and wife, the creditor will have constructive notice that the wife is a surety, if the public records show that the land belonged to the wife.<sup>84</sup>

If the relation does not appear upon the instrument itself, the burden is on the surety to show that the creditor had knowledge of it;<sup>85</sup> but, where it is shown that one of the makers of a promissory note was a surety, the presumption is that the creditor knew it.<sup>86</sup>

*Showing Relation by Oral Evidence.*

A surety may show, by oral evidence, not only that he sustains that relation,<sup>87</sup> but the particular kind of suretyship con-

<sup>83</sup> Ward v. Stout, 32 Ill. 399; Flynn v. Mudd, 27 Ill. 323.

<sup>84</sup> Trentman v. Eldridge, 98 Ind. 525; Bank of Albion v. Burns, 46 N. Y. 170; Smith v. Townsend, 25 N. Y. 479.

<sup>85</sup> Summerhill v. Tapp, 52 Ala. 227; Stewart v. Parker, 55 Ga. 656; Tharp v. Parker, 86 Ind. 102; Morgan v. Thompson, 60 Iowa, 280, 14 N. W. 306; Neel v. Harding, 59 Ky. (2 Metc.) 247; Wilson v. Foot, 52 Mass. (11 Metc.) 285; Agnew v. Merritt, 10 Minn. 308 (Gil. 242); Patterson v. Brock, 14 Mo. 473; Nichols v. Parsons, 6 N. H. 30, 23 Am. Dec. 706; Kalign v. Fuller, 14 N. J. Eq. (1 McCarter) 419; Elwood v. Delfendorf, 5 Barb. (N. Y.) 398; Nelmciewicz v. Gahn, 3 Paige (N. Y.) 614; Torrence v. Alexander, 85 N. C. 143; Dozier v. Lea, 26 Tenn. (7 Humph.) 520; Roberts v. Bane, 32 Tex. 385; Culbertson v. Wilcox, 11 Wash. 522, 39 Pac. 954; 40 Cent. Dig. col. 1653.

<sup>86</sup> Ward v. Stout, 32 Ill. 399.

<sup>87</sup> Branch Bank of State at Mobile v. James, 9 Ala. 949; Kendall v. Milligan, 62 Ark. 629, 34 S. W. 78; Diescher v. Fulham, 11 Colo. App. 62, 52 Pac. 685; Orvis v. Newell, 17 Conn. 97; Bowen v. Darby, 14 Fla. 202; Stewart v. Parker, 55 Ga. 656; Kennedy v. Evans, 31 Ill. 258; Flynn v. Mudd, 27 Ill. 323; Piper v. Newcomer, 25 Iowa, 221; Kelly v. Gillespie, 12 Iowa, 55, 79 Am. Dec. 516; Rose v. Williams, 5 Kan. 483; Chapeze v. Young, 87 Ky. 476, 9 S. W. 399; Roberts v. Jenkins, 19 La. 455; Cummings v. Little, 45 Me. 183; Harris v. Brooks, 38 Mass. (21 Pick.) 195, 32 Am. Dec. 254; Stevens v. Oaks, 58 Mich. 343, 25 N. W. 309; Davis v. Mikell, 1 Freem. Ch. (Miss.)

tract entered into by him,<sup>88</sup> and that the creditor knew it; and it makes no difference that the instrument is under seal.<sup>89</sup> This is not varying a written instrument, as such relation is not inconsistent with the liability shown upon the instrument, but is showing what the contract really is.<sup>90</sup> Not only may a surety show the true relation, but he may show, also, any other terms of the contract entered into between the surety and the creditor, which do not alter the terms as written.<sup>91</sup>

Oral evidence will not be allowed to show that no liability was intended;<sup>92</sup> nor that the surety was not to be liable except upon a certain contingency;<sup>93</sup> nor can the relation

548; *Stillwell v. Aaron*, 69 Mo. 539, 33 Am. Rep. 517; *Grafton Bank v. Woodward*, 5 N. H. 99, 20 Am. Dec. 566; *Hubbard v. Gurney*, 64 N. Y. 457, overruling *Campbell v. Tate*, 7 Lans. (N. Y.) 370; *Gahn v. Niemcewicz*, 11 Wend. (N. Y.) 312; *Welfare v. Thompson*, 83 N. C. 276; *Thompson v. Coffman*, 15 Or. 631, 16 Pac. 713; *Otis v. Von Storch*, 15 R. I. 41, 23 Atl. 39; *Fowler v. Alexander*, 1 Helsk. (Tenn.) 425; *Burke v. Cruger*, 8 Tex. 66, 58 Am. Dec. 102; *Adams v. Flanagan*, 36 Vt. 400; *Boulware v. Hartsook*, 83 Va. 679, 3 S. E. 289; *Bank of British Columbia v. Jeffs*, 15 Wash. 231, 46 Pac. 247; *Harmon v. Hale*, 1 Wash. T. 422, 34 Am. Rep. 816; *KEARNES v. MONTGOMERY*, 4 W. Va. 29; *Irvine v. Adams*, 48 Wis. 468, 4 N. W. 573, 33 Am. Rep. 817. Oral evidence is admissible to show that one joint maker of a promissory note, after its execution, promised to pay it. *Vary v. Norton* (C. C.) 6 Fed. 808. The creditor may show, also, that a person indorsing a promissory note in blank agreed to guaranty its payment. *Beckwith v. Angell*, 6 Conn. 315.

<sup>88</sup> *Marsh v. Consolidation Bank*, 48 Pa. 510.

<sup>89</sup> *Rogers v. School Trustees*, 46 Ill. 428; *Smith v. Clopton*, 48 Miss. 66; *Smith v. Doak*, 3 Tex. 215.

<sup>90</sup> *Bank of St. Marys v. Mumford*, 6 Ga. 44; *Ward v. Stout*, 32 Ill. 399; *Rose v. Williams*, 5 Kan. 483; *Harris v. Brooks*, 21 Pick. (Mass.) 195, 32 Am. Dec. 254; *Hubbard v. Gurney*, 64 N. Y. 457.

<sup>91</sup> *Dwight v. Linton*, 3 Rob. (La.) 57; *First Nat. Bank v. Flske*, 133 Pa. 241, 19 Atl. 554, 7 L. R. A. 209, 19 Am. St. Rep. 635. See ante, c. IV, note 6. As to the right to show by oral evidence conditions and restrictions upon regular indorsements, see *Stearns' Law of Suretyship*, p. 203. The weight of authority is that they cannot be shown. *Beattie v. Browne*, 64 Ill. 360; *Fassin v. Hubbard*, 55 N. Y. 465. *Norton, Bills and Notes* (3d Ed.) p. 114.

<sup>92</sup> *Geneser v. Wissner*, 69 Iowa, 119, 28 N. W. 471; *Gumz v. Giegling*, 108 Mich. 295, 66 N. W. 48.

<sup>93</sup> It cannot be shown that there was to be no liability except on the death of the principal. *Miller v. Ridgely* (C. C.) 22 Fed. 889.

orally assumed by a party to a negotiable instrument be shown to the prejudice of a holder thereof for value without notice.<sup>94</sup>

**SURETY REMAINS LIABLE BY CONSENT TO SUBSEQUENT NEGOTIATIONS.**

**105. The liability of a surety is not affected by any subsequent dealing between the creditor or obligee and the principal, to which the surety consents.**

While a surety may be discharged by subsequent transactions between the principal and the creditor or obligee if he has not assented thereto, he remains liable if he has given his consent.<sup>95</sup> So far as a new contract has been made by any change in the old one, such new contract has become the surety's contract.

This consent may be given in advance,<sup>96</sup> or at the time of the negotiations between the principal and the creditor, or it

<sup>94</sup> *Piper v. Headlee*, 39 Ill. App. 93.

<sup>95</sup> *Rockville Nat. Bank v. Holt*, 58 Conn. 526, 20 Atl. 669, 18 Am. St. Rep. 293; *Gardiner v. Harback*, 21 Ill. 129; *Crosby v. Wyatt*, 10 N. H. 318; *Klein v. Long*, 27 App. Div. 158, 50 N. Y. Supp. 419; *Corlies v. Estes*, 31 Vt. 653. A surety remains bound, if he consent to an extension of time to the principal. *Gray's Ex'rs v. Brown*, 22 Ala. 262; *Adams v. Way*, 32 Conn. 160; *Furber v. Bassett*, 2 Duv. (Ky.) 433; *Osgood v. Miller*, 67 Me. 174; *Thornton v. Dabney*, 23 Miss. (1 Cushm.) 559; *Gregory v. Solomon*, 19 N. J. Law (4 Har.) 112; *Wright v. Storrs*, 6 Bosw. (N. Y.) 600; *Rice v. Isham*, 4 Abb. Dec. (N. Y.) 37; *Baldwin v. Western Reserve Bank*, 5 Ohio, 273; *Wolf v. Fink*, 1 Pa. 435, 44 Am. Dec. 141; *Bowling v. Flood*, 69 Tenn. (1 Lea) 678; *Hunter's Adm'r v. Jett*, 4 Rand. (Va.) 104; *Knight v. Charter*, 22 W. Va. 422; *Suydam v. Vance*, 2 McLean (U. S.) 99, Fed. Cas. No. 13,657; 40 Cent. Dig. col. 2069. So, if he consent to a relinquishment of securities held by the creditor. *Pence v. Gale*, 20 Minn. 257 (Gil. 231); *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119, 41 Am. Dec. 685; 40 Cent. Dig. col. 2074. Or a release of the principal. *Rockville Nat. Bank v. Holt*, 58 Conn. 526, 20 Atl. 669, 18 Am. St. Rep. 293; *Osgood v. Miller*, 67 Me. 174; *Parsons v. Gloucester Bank*, 10 Pick. (Mass.) 533; *Hutchinson v. Wright*, 61 N. H. 108; *Wright v. Storrs*, 6 Bosw. (N. Y.) 600; *Davidson v. Cooper*, 8 Mees & W. 755. Or to a release of the principal from imprisonment. *Hawkins v. Mims*, 36 Ark. 145, 38 Am. Rep. 80. Or to the release of a co-surety. *State v. Van Pelt*, 1 Ind. (1 Cart.) 304.

<sup>96</sup> *SMITH v. MOLLESON*, 148 N. Y. 241, 42 N. E. 669.

A contract of suretyship is subject to the same general rules which govern the discharge of contracts in general;<sup>110</sup> but it is the purpose here to treat of the rules which more peculiarly apply to this kind of contract. It must be borne in mind that the contract is subject to termination either before or after default, or it may be terminated after one default, but before another has taken place. A surety, in one sense, is liable when he executes the contract. In another sense, he is liable after the principal is in default. In the first case it would be proper to speak of the original contract being terminated, if it merely refers to the fact that the surety cannot be called upon to respond in damages on account of anything that might occur thereafter. If there has been a default, and the surety might be called upon to respond in damages, it might be more proper to speak of any action which relieved the surety from this liability as a discharge. But the original liability arising upon execution of the contract, and the liability which arises upon a breach of the contract, are so interwoven that it will not be possible to treat of the two separately. Some occurrence might terminate the contract as to the surety, so far as future acts were concerned, leaving him liable for defaults which had previously occurred; or he might be discharged as to both past and future defaults.

In addition to the difficulty which is common to all contracts, a contract of suretyship is complicated still further, so far as treating of the discharge of the surety is concerned, by the fact that the dealings between the creditor or obligee and the principal are a very important factor; and a surety may be discharged although the principal remains liable, or the surety may remain liable though the principal may be discharged, or they both may be discharged. Owing to these difficulties, a systematic arrangement of the different modes in which a surety may be discharged seems impossible, and the different defenses will be taken in order.

<sup>110</sup> See, as to these rules, Clark, *Cont.* (2d Ed.) c. XI.

**DISCHARGE BY ALTERATION OF THE CONTRACT.**

**107. An alteration of a contract of suretyship will render it void as to the surety, unless—**

- (a) It is made by the creditor or obligee without knowledge of the relation, and with the consent of the principal.**
- (b) It is made with the consent of the surety.**
- (c) It is made by some one not seeking to enforce it, or who was not a party to the contract.**
- (d) It is made unintentionally.**
- (e) The surety has been negligent.**
- (f) It is immaterial.**

The general rule is that a material alteration of a contract in writing, by addition, subtraction, or both, avoids it,<sup>111</sup> provided the other party has not consented thereto; and the rule is not affected by the fact that the surety has received a consideration.<sup>112</sup>

As a contract of suretyship is a sort of triangular one, involving the various rights of the creditor or obligee, the principal, and the surety, many transactions between the creditor

<sup>111</sup> *Glover v. Robbins*, 49 Ala. 219, 20 Am. Rep. 272; *Rowan v. Sharps*, 33 Conn. 1; *Bank of Newark v. Crawford*, 2 Houst. (Del.) 282; *Hanson v. Crawley*, 41 Ga. 303; *Wyman v. Yeomans*, 84 Ill. 403; *Newlan v. Harrington*, 24 Ill. 206; *Eckert v. Louis*, 84 Ind. 99; *Bell v. Mahin*, 69 Iowa, 408, 29 N. W. 331; *Jackson v. Cooper*, 19 Ky. Law Rep. 9, 39 S. W. 39; *Langley v. Adams*, 40 Me. 125; *Bullen v. Dresser*, 116 Mass. 267; *Wilde v. Armsby*, 6 Cush. (Mass.) 314; *Bolton v. Nitz*, 88 Mich. 354, 50 N. W. 291; *People v. Brown*, 2 Doug. (Mich.) 9; *State v. Findley*, 101 Mo. 217, 14 S. W. 185; *Haines v. Dennett*, 11 N. H. 180; *Church v. Howard*, 17 Hun (N. Y.) 5; *Chappell v. Spencer*, 23 Barb. (N. Y.) 584; *Thompson v. Massie*, 41 Ohio St. 307; *Hartley v. Corboy*, 150 Pa. 23, 24 Atl. 295; *Miller v. Gilleland*, 19 Pa. 119; *Sanders v. Bagwell*, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770, affirming 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743; *Frazier v. Gains*, 61 Tenn. 92; *Cudahy Packing Co. v. Shepard* (Tex. Civ. App. 1904) 82 S. W. 786; *St. Albans Bank v. Dillon*, 80 Vt. 122, 73 Am. Dec. 295; *Walla Walla County v. Ping*, 1 Wash. T. 339; *State v. Sureties*, 4 Wyo. 347, 34 Pac. 3; *Angle v. Northwestern Life Ins. Co.*, 92 U. S. 330, 23 L. Ed. 556; *Miller v. Stewart*, 4 Wash. C. C. (U. S.) 28, Fed. Cas. No. 9,591; 40 Cent. Dig. col. 1840.

<sup>112</sup> *Ziegler v. Hallahan*, 131 Fed. 205, 66 C. C. A. 1, affirming (C. C.) 126 Fed. 788.



and the principal, which would have no effect so far as their respective rights and liabilities are concerned, will terminate conclusively the liability of the surety. As has been shown, the creditor, in order to be prejudiced by transactions between himself and the principal, must have knowledge of the relation;<sup>118</sup> and the surety remains liable if he consents to any arrangement made between the creditor and the principal.<sup>114</sup> This leaves for consideration here the question whether a change in the contract is material or not, for an immaterial alteration does not affect the liability of the surety.<sup>116</sup>

*Spoilation.*

A distinction first must be made between alteration and what is designated as "spoliation."<sup>116</sup> A change made by a third party without the knowledge of the creditor,<sup>117</sup> such as the alteration of a stolen bond by a thief,<sup>118</sup> or by one who is merely a custodian,<sup>119</sup> will not affect the liability of a surety thereon; but the contract will be enforced as it was originally. So, if the change has been made by the creditor himself by accident, his rights will not be affected;<sup>120</sup> but, if the alteration was intentional, a restoration to its original form will not revive the liability of the surety.<sup>121</sup>

The actual intent with which the alteration has been made is not material, so far as the liability of the surety is concerned;<sup>122</sup> nor will the courts consider whether the alteration

<sup>118</sup> Ante, § 102.

<sup>114</sup> Ante, § 105.

<sup>116</sup> See note 200, *infra*.

<sup>117</sup> *Anderson v. Bellenger*, 87 Ala. 334, 6 South. 82, 4 L. R. A. 680, 13 Am. St. Rep. 46; *Brooks v. Allen*, 62 Ind. 401; *Murray v. Graham*, 29 Iowa, 520; *Brown v. Weatherby*, 71 Mo. 152; *Evans v. Williamson*, 79 N. C. 86; *Rhoads v. Frederick*, 8 Watts (Pa.) 448; *Hill v. Calvert*, 1 Rich. Eq. (S. C.) 56; *Harrison v. Turbeville*, 2 Humph. (Tenn.) 242.

<sup>117</sup> *Boyd v. McConnell*, 10 Humph. (Tenn.) 68. Where the creditor could not read, and the change was made without his knowledge, his rights were not affected. *Bucklen v. Huff*, 53 Ind. 474.

<sup>118</sup> *Force v. Elizabeth*, 28 N. J. Eq. 403.

<sup>119</sup> *State ex rel. Jackson Tp. v. Berg*, 50 Ind. 496.

<sup>120</sup> *Nevins v. De Grand*, 15 Mass. 436.

<sup>121</sup> *American Casualty Ins. Co. of Oneonta v. Green*, 178 N. Y. 580, 70 N. E. 1094, affirming 70 App. Div. 287, 75 N. Y. Supp. 407.

<sup>122</sup> *Hart v. Clouser*, 30 Ind. 210; *Marsh v. Griffin*, 42 Iowa, 402;

has been of benefit to the surety or not.<sup>123</sup> While in many cases an alteration is clearly for the benefit of the surety, in other cases it might be difficult to determine, and the only safe rule to be followed is that every alteration is prejudicial.<sup>124</sup> Besides, whether beneficial or not, the altered contract is not the surety's contract, and he should not be compelled to perform a contract which he has not made, without giving him some choice in the matter.<sup>125</sup> He cannot be charged upon the altered contract, because it is not his; nor can he be charged upon the original contract, for that contract no longer exists.<sup>126</sup>

*Alteration by One Party Does Not Affect Rights of Others.*

As the liability of a surety can be affected by the act of the person only who seeks to enforce the contract, it might happen that a change in a contract would have the effect of freeing the surety from liability as to some, but not as to others. Such would be the case in a bond given to secure the performance of a building contract, and to protect the employes of the contractor. A change in the building contract, to which the owner of the building consents, might take away

Jones v. Bangs, 40 Ohio St. 139, 48 Am. Rep. 664; Neff v. Horner, 63 Pa. 327, 3 Am. Rep. 555. Wood v. Steele, 6 Wall. (U. S.) 80.

<sup>123</sup> Anderson v. Bellenger, 87 Ala. 334, 6 South. 82, 4 L. R. A. 680, 13 Am. St. Rep. 46; Taylor v. Johnson, 17 Ga. 521; Weir Plow Co. v. Walmsley, 110 Ind. 242, 11 N. E. 232; McGuire v. Wooldridge, 6 Rob. (La.) 47; Board of Com'rs of Renville County v. Gray, 61 Minn. 242, 63 N. W. 635; Bangs v. Strong, 7 Hill (N. Y.) 250, 42 Am. Dec. 64; Berks County Com'rs v. Ross, 3 Bin. (Pa.) 520, 5 Am. Dec. 383; United States v. Tillotson, 25 U. S. (12 Wheat.) 180, 6 L. Ed. 594, reversing 1 Paine (U. S.) 305, Fed. Cas. No. 16,524; Ziegler v. Hallahan, 131 Fed. 205, 66 C. C. A. 1, affirming (C. C.) 126 Fed. 788; Home v. Brumskill, L. R. 3 Q. B. D. 495. In Massachusetts the surety is not discharged by an alteration which cannot prejudice him, such as a reduction of interest. CAMBRIDGE SAVINGS BANK v. HYDE, 131 Mass. 77, 41 Am. Rep. 193.

<sup>124</sup> Toomer v. Dickerson, 37 Ga. 428; Mayhew v. Boyd, 5 Md. 102, 59 Am. Dec. 101; Smith v. Rice, 27 Mo. 505, 72 Am. Dec. 281; Grant v. Smith, 46 N. Y. 93; Church v. Howard, 17 Hun (N. Y.) 5.

<sup>125</sup> Chadwick v. Eastman, 53 Me. 12; Neff v. Horner, 63 Pa. 327, 3 Am. Rep. 555; WOOD v. STEELE, 6 Wall. (U. S.) 80, 18 L. Ed. 725; CALVERT v. LONDON DOCK CO., 2 Keen, 628.

<sup>126</sup> John A. Tolman Co. v. Hunter, 113 Mo. App. 671, 88 S. W.

the right of the owner to hold the surety liable for a breach of the contract, but could not affect the rights of the employés, who had not participated in the alteration.<sup>127</sup>

*Alterations by Law.*

The rule that a surety is discharged by an alteration in the contract is not affected by the fact that the change has been made by law.<sup>128</sup> If the nature of the duties of a public office are changed by the Legislature, a surety will be discharged,<sup>129</sup> as in the case of a private officer, if the nature of the duties are changed, or if the term of office be extended.<sup>130</sup> Where a recognizance provided for the appearance of the principal at the next regular term of court, and at a subsequent term there was an agreement between him and the state affecting this condition, this will discharge the sureties.<sup>131</sup>

*Negligence Facilitating Alteration.*

The rule that a surety will be discharged by an alteration of the contract is subject to the exception that he will remain liable if he has been negligent and the altered instrument gets into the hands of a purchaser for value without notice.<sup>132</sup> Thus, where a note for \$500, signed by a surety, contained spaces both before and after the amount, and the word "twenty" was written in one and "fifty" in the other, changing the amount to \$2,550, the surety was estopped to show the alteration.<sup>133</sup>

*Alterations of Negotiable Instruments.*

The courts were formerly more strict in regard to alterations than they are in modern times, treating alterations as

<sup>127</sup> *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806; *UNITED STATES v. NATIONAL SURETY CO.*, 92 Fed. 549, 34 C. C. A. 526.

<sup>128</sup> A surety is discharged, though the alteration be made by order of court. *Appeal of Shearer*, 96 Pa. 61; *Sage v. Strong*, 40 Wis. 375.

<sup>129</sup> *Manufacturers' Nat. Bank of City of Newark v. Dickerson*, 41 N. J. Law, 448, 32 Am. Rep. 237; *Mumford v. Railroad Co.*, 2 Lea (Tenn.) 393, 31 Am. Rep. 616; *Pybus v. Gibb*, 6 El. & Bl. 902.

<sup>130</sup> See ante, § 91, 1, and note 217, *infra*.

<sup>131</sup> *Reese v. United States*, 9 Wall. (U. S.) 13, 19 L. Ed. 541; *United States v. Backland* (C. C.) 33 Fed. 156.

<sup>132</sup> *Blakey v. Johnson*, 76 Ky. (13 Bush.) 197, 26 Am. Rep. 254.

<sup>133</sup> *Hackett v. First Nat. Bank*, 114 Ky. 193, 70 S. W. 664.

material which would not be classed so now.<sup>134</sup> The courts always have been, and are now, more strict in regard to negotiable instruments than with other classes of contracts, as negotiable instruments have many of the characteristics of a circulating medium, and any changes which might affect the identity of an instrument would facilitate fraud.<sup>135</sup> A material alteration discharges a surety, even as against a purchaser for value without notice,<sup>136</sup> unless the surety has been negligent.

*Change of Place of Performance.*

A change as to the place of performance is a material alteration,<sup>137</sup> as it is the duty of the surety to perform or see that the principal performs, and, if the place be changed without his consent, his duties may be increased.<sup>138</sup>

*Change of Date or Time.*

A change in the time of payment<sup>139</sup> is material, as would be a change in the date of an instrument,<sup>140</sup> if the time of performance is calculated from the date, as the time of performance would be changed thereby.<sup>141</sup> If the time of performance is made to occur at an earlier date, the surety would be called upon to perform sooner than he intended. If the

<sup>134</sup> *Pligot's Case*, 11 Coke, 27.

<sup>135</sup> *Newlan v. Harrington*, 24 Ill. 206.

<sup>136</sup> *Norton, Bills & Notes* (3d Ed.) p. 246.

<sup>137</sup> *Pelton v. San Jacinto Lumber Co.*, 113 Cal. 21, 45 Pac. 12; *Pahlman v. Taylor*, 75 Ill. 629; *Townsend v. Wagon Co.*, 10 Neb. 615, 7 N. W. 274, 35 Am. Rep. 493; *Nazro v. Fuller*, 24 Wend. (N. Y.) 374; *Southwark Bank v. Gross*, 35 Pa. 82. A guarantor is not discharged by the removal of the business of the principal to another place, although the guaranty describes the principal as residing in the former place. *Rouss v. King*, 69 S. C. 168, 48 S. E. 220.

<sup>138</sup> *Woodworth v. Bank*, 19 Johns. (N. Y.) 420, 10 Am. Dec. 239; *United States v. Boecker*, 21 Wall. (U. S.) 652, 22 L. Ed. 472.

<sup>139</sup> *Stayner v. Joice*, 82 Ind. 35. And see post, § 108, as to an extension of the time of payment discharging a surety.

<sup>140</sup> *Wyman v. Yeomans*, 84 Ill. 403; *Britton v. Dierker*, 46 Mo. 501, 2 Am. Rep. 553; *Bank of Commonwealth v. McChord*, 4 Dana (Ky.) 191, 29 Am. Dec. 398; *Miller v. Gilleland*, 19 Pa. 119; *Stephens v. Graham*, 7 Serg. & R. (Pa.) 505, 10 Am. Dec. 485; *WOOD v. STEELE*, 6 Wall. (U. S.) 80, 18 L. Ed. 725.

<sup>141</sup> *Brannum Lumber Co. v. Pickard* (1904) 33 Ind. App. 484, 71 N. E. 676.

time of performance is postponed, the statute of limitations would not begin to run as soon, and he is prejudiced.<sup>143</sup>

*Change as to Amount.*

A change of amount is material,<sup>143</sup> whether the amount be made greater<sup>144</sup> or smaller,\* or if an amount be inserted where none existed before.<sup>145</sup> If a surety undertakes to become liable for advances of money to be made to the principal, "at no time exceeding \$5,000," the surety will not be liable for any sum if the advances at any time exceed that amount, for the surety might suppose that the principal possessed sufficient ability to handle that sum, but no greater sum;<sup>146</sup> but, if the intention of the surety was to limit his own liability to a certain amount, advances to the principal to a greater amount will not relieve the surety to the extent of the amount named.<sup>147</sup> Nor is it a defense, where a guaranty for a certain amount is given, that a smaller credit was extended to the principal; otherwise, the principal, by refusing to avail himself of the full amount of his credit, could prevent any liability attaching to the guarantor.<sup>148</sup>

*Changes as to Interest.*

A change in the rate<sup>149</sup> or in the time of payment of interest, or adding or erasing a provision for the payment of

<sup>143</sup> *Miller v. Gilleland*, 19 Pa. 119.

<sup>144</sup> *Sans v. People*, 3 Gilman (Ill.) 327; *Portage County Branch Bank v. Lane*, 8 Ohio St. 405; *ELLESMERE BREWING CO. v. COOPER*, [1896] 1 Q. B. D. 75.

<sup>145</sup> *Sage v. Strong*, 40 Wis. 575.

\* An indorsement of a pretended partial payment on an instrument at the time of its delivery will discharge a surety thereon. *Johnston v. May*, 76 Ind. 293.

<sup>146</sup> *People, to Use of Buffington, v. Organ*, 27 Ill. 27, 79 Am. Dec. 391.

<sup>147</sup> *Farmers' & Mechanics' Bank of Michigan v. Evans*, 4 Barb. (N. Y.) 487. And see *Ryan v. Shawneetown*, 14 Ill. 20.

<sup>148</sup> *Clagett v. Salmon*, 5 Gill & J. (Md.) 314; *Curtis v. Hubbard*, 6 Metc. (Mass.) 186; *Rouss v. King*, 69 S. C. 168, 48 S. E. 220; *Parker v. Wise*, 6 Maule & S. 239.

<sup>149</sup> *Lindsay v. Parkinson*, 5 Ir. L. R. 124.

<sup>150</sup> Increasing the rate of interest discharges a surety. *Thompson v. Massie*, 41 Ohio St. 307; *Sanders v. Bagwell*, 37 S. C. 145, 15 S.

interest,<sup>150</sup> or changing the time when interest is to begin,<sup>151</sup> is material.

*Changes in Names.*

The addition<sup>152</sup> or erasure<sup>153</sup> of signatures is a material alteration. If the name of the payee of a promissory note be changed, it affects its identity; and a surety thereon would not be liable.<sup>154</sup>

A change in the name of a place may be a material alteration. Thus, where a guaranty of the payment of goods was

E. 714, 16 S. E. 770, affirming 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743. So does a reduction in the rate. *Price v. Dime Bank*, 124 Ill. 317, 15 N. E. 754, 7 Am. St. Rep. 367; Contra, *CAMBRIDGE SAVINGS BANK v. HYDE*, 131 Mass. 77, 41 Am. Rep. 193.

<sup>150</sup> *Glover v. Robbins*, 49 Ala. 219, 20 Am. Rep. 272; *Franklin Life Ins. Co. v. Courtney*, 60 Ind. 134; *Marsh v. Griffin*, 42 Iowa, 403; *Locknane v. Emmerson*, 74 Ky. (11 Bush) 69; *Waterman v. Vose*, 43 Me. 504; *Fay v. Smith*, 1 Allen (Mass.) 477, 79 Am. Dec. 752; *Dewey v. Reed*, 40 Barb. (N. Y.) 16; *Jones v. Bangs*, 40 Ohio St. 139, 48 Am. Rep. 664; *Fulmer v. Seitz*, 68 Pa. 237, 8 Am. Rep. 172; *Neff v. Horner*, 63 Pa. 327, 3 Am. Rep. 555; 40 Cent. Dig. col. 1845.

<sup>151</sup> *Coburn v. Webb*, 56 Ind. 96, 26 Am. Rep. 15.

<sup>152</sup> *Crandall v. Auburn Bank*, 61 Ind. 349; *Berryman v. Manker*, 56 Iowa, 150, 9 N. W. 103; *Rumley Co. v. Wilcher*, 23 Ky. Law Rep. 1745, 66 S. W. 7; *Chadwick v. Eastman*, 53 Me. 12; *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48; *Gardner v. Walsh*, 5 El. & Bl. 82. There is some conflict on this point, but the rule as stated is the decided weight of authority. See *Stearns, Law of Suretyship*, p. 105. The addition of the name of a surety, where there was previously but one surety, would be beneficial to the former, as his liability is shared; but the addition of the name of a surety, where there are two or more previously, might affect their right of contribution. In *Boyd v. Agricultural Ins. Co.*, 20 Colo. App. 23, 76 Pac. 986, it was held that additional signatures procured before delivery of the instrument, was not an alteration; and in the case of the bonds of public officers it seems that, on the ground of public policy, each surety impliedly consents to the signatures of additional sureties. *Governor, to Use of Thomas, v. Lagow*, 43 Ill. 134. Where signatures are added without the knowledge of the creditor, and he has nothing to put him on inquiry, all of the sureties are liable. *WARD v. HACKETT*, 30 Minn. 150, 14 N. W. 578, 44 Am. Rep. 187.

<sup>153</sup> *State ex rel. Board of Com'rs of La Porte County v. Van Pelt*, 1 Smith (Ind.) 118; *Mitchell v. Burton*, 2 Head. (Tenn.) 613; *Smith v. United States*, 2 Wall. (U. S.) 219, 17 L. Ed. 788.

<sup>154</sup> *Bell v. Mahin*, 69 Iowa, 408, 29 N. W. 331; *Robinson v. Berryman*, 22 Mo. App. 509.

addressed "to any person in Macon," and "Griffin" was inserted in place of "Macon," the guarantor could not be held liable.<sup>155</sup>

The following changes were held to be material: Adding<sup>156</sup> or erasing<sup>157</sup> a provision for payment in gold; erasing or adding the word "surety";<sup>158</sup> making the liability of a party that of a surety instead of a guarantor,<sup>159</sup> or changing a conditional guaranty into an absolute one;<sup>160</sup> adding words of negotiability to a nonnegotiable note;<sup>161</sup> adding<sup>162</sup> or removing<sup>163</sup> a seal; changes affecting the liability of the parties,<sup>164</sup> and abrogating a clause providing for a release.<sup>165</sup>

*Alteration of Contract Secured.*

It does not make any difference, in the application of the rule, whether the alteration is made in the contract of suretyship itself, or in the contract which the contract of suretyship is intended to secure. An alteration of the contract secured will free the surety from liability;<sup>166</sup> but, if two contracts

<sup>155</sup> Johnson v. Brown, 51 Ga. 498.

<sup>156</sup> Hanson v. Crawley, 41 Ga. 303; Darwin v. Rippey, 63 N. C. 818; Bogarth v. Breedlove, 39 Tex. 561.

<sup>157</sup> Church v. Howard, 17 Hun (N. Y.) 5.

<sup>158</sup> Robinson v. Reed, 46 Iowa, 219.

<sup>159</sup> Robinson v. Reed, 46 Iowa, 219.

<sup>160</sup> Newlan v. Harrington, 24 Ill. 206.

<sup>161</sup> Haines v. Dennett, 11 N. H. 180.

<sup>162</sup> Fred Helm Brewing Co. v. Hazen, 55 Mo. App. 277. The addition of a seal gives a different legal character to the writing, and changes the remedies upon it. DAVIDSON v. COOPER, 13 Mees. & W. 343.

<sup>163</sup> Organ v. Allison, 68 Tenn. (9 Baxt.) 459.

<sup>164</sup> Warren v. Fant, 79 Ky. 1. Making a joint and several contract a joint one only is a material alteration. Eckert v. Louls, 84 Ind. 99. This might be regarded as an immaterial alteration in those states where joint contracts have been made joint and several by statute.

<sup>165</sup> Paine v. Jones, 76 N. Y. 274; Id., 14 Hun (N. Y.) 577.

<sup>166</sup> Roberts v. Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; Clark v. Gerstley, 26 App. D. C. 205; Guthrie v. Carpenter, 162 Ind. 417, 70 N. E. 486; American Casualty Ins. Co. v. Green, 178 N. Y. 580, 70 N. E. 1094, affirming 70 App. Div. 267, 75 N. Y. Supp. 407; Stafford v. Christian (Tex. Civ. App. 1904) 79 S. W. 595; United States v. Corwine, 1 Bond (U. S.) 339, Fed. Cas. No. 14,871; HOLME v. BRUNSKILL (1877) L. R. 3 Q. B. D. 495; POLAK v. EVERETT

are secured, an alteration of one will not discharge a surety as to the other.<sup>167</sup> Nor will he be discharged by some matter which is collateral to the contract which the surety has undertaken shall be performed. Thus, where a bond has been given to secure the fidelity of service of a clerk, a subsequent arrangement between the employer and employé that service should be terminable at three months' notice, instead of one, will not terminate the surety's liability.<sup>168</sup> It might be otherwise, however, if that had been an express term in the contract of employment, and the contract of employment had been incorporated by reference in the contract of suretyship. So, where a provision in the contract is for the sole benefit of the obligee, he may waive a compliance therewith without affecting the surety's liability.<sup>169</sup>

*Changes in Building Contracts.*

If a contractor enters into a contract for the erection of a building, and gives a bond for its faithful performance, a surety thereon will not be liable if an alteration be made, either in the bond or in the contract which the bond was intended to secure.<sup>170</sup> If an alteration be made in the bond, it

(1876) L. R. 1 Q. B. D. 669. A change in a contract to run a tunnel from around a hill to through the hill will discharge a surety therefor. *City of Middletown v. Aetna Indemnity Co.*, 97 App. Div. 344, 90 N. Y. Supp. 16. So a surety for an account is discharged by the creditor taking a note bearing higher interest and providing for attorney fees. *Casey-Swasey Co. v. Anderson* (Tex. Civ. App. 1904) 83 S. W. 840. And where an agreement to lease 30 cows is changed by an arrangement whereby 28 are leased part of the year, and 32 for the other part. *WHITCHER v. HALL*, 5 Barn. & C. 269.

<sup>167</sup> *Park & Lacy Co. v. White River Lumb. Co.*, 110 Cal. 658, 43 Pac. 202.

<sup>168</sup> *SANDERSON v. ASTON* (1873) L. R. 8 Exch. 73.

<sup>169</sup> *American Surety Co. v. San Antonio Loan Co.* (Tex. Civ. App. 1906) 98 S. W. 387. Where a contract for the purchase of strawberries was entered into, to be paid for on delivery, a surety for the purchasers was held liable, although several installments of strawberries were delivered without being paid for. The provision for payment was for the benefit of the seller, and he was not obliged to insist on cash payment on the delivery of each installment. *Kirby v. Studebaker*, 15 Ind. 45.

<sup>170</sup> *McCONNELL v. POOR*, 113 Iowa, 133, 84 N. W. 908, 52 L. R. A. 312. And see, post, § 122, as to the performance of the contract.



ceases to be the bond made by the surety.<sup>171</sup> If an alteration be made in the building contract, it ceases to be the contract to secure the performance of which the bond was given, and a breach of the contract as altered does not come within the provisions of the surety's contract.

Changes in a building contract, which impose an additional duty upon the contractor, will release a surety upon the contractor's bond.<sup>172</sup> So, if the building contract provides for payment in installments by the owner to the contractor as the building progresses toward completion, the payment of an installment in advance would release the sureties,<sup>173</sup> as the incentive of the contractor to perform his contract within the time provided for in the contract is thus taken away.<sup>174</sup>

An independent collateral agreement between the owner and the contractor, making definite some clauses of the building contract, but not changing such clause, is not an alteration.

#### *Changes in Contracts of Employment.*

Where a bond has been given to secure the faithful performance of a contract of employment, and a material change is made in such contract of employment, a surety on the bond will not be liable for a default by the employé.<sup>175</sup> Such a change may be made in the duties, or in the remuneration, or it may be in some other term of the contract.<sup>176</sup> Changes in

<sup>171</sup> See note 126, *supra*.

<sup>172</sup> If the contract is changed by a provision that the contractor is to build an additional story, a surety is discharged. *Judah v. Zimmerman*, 22 Ind. 388.

<sup>173</sup> *Lawhon v. Toors*, 73 Ark. 478, 84 S. W. 636; *Glenn County v. Jones*, 146 Cal. 518, 80 Pac. 695; *Backus v. Archer*, 100 Mich. 606, 67 N. W. 913; *Simonson v. Grant*, 36 Minn. 439, 31 N. W. 861; *Evans v. Graden*, 125 Mo. 72, 28 S. W. 439; *Board of Commissioners v. Branham* (C. C.) 57 Fed. 179.

<sup>174</sup> *CALVERT v. LONDON DOCK CO.*, 2 Keen, 628.

<sup>175</sup> *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; *Osborne v. Van Houten*, 45 Mich. 444, 8 N. W. 77.

<sup>176</sup> *Boston Hat Manufactory v. Messinger*, 2 Pick. (Mass.) 223; *Gass v. Stinson*, 2 Sumn. (U. S.) 453, Fed. Cas. No. 5,260. A change in the territory within which the employé was to work would discharge a surety. *White Sewing Mach. Co. v. Mullins*, 41 Mich. 339, 2 N. W. 196; *Miller v. Stewart*, 9 Wheat. (U. S.) 680, 6 L. Ed. 189.

the principal's duties will relieve the surety from liability,<sup>177</sup> unless the new duties are within the scope of his original employment, or the right to make such changes is reserved in the contract.<sup>178</sup> The addition of new duties, the original duties not being changed, will not affect the liability of a surety,<sup>179</sup> unless the new duties interfere with the proper performance of the original ones; nor does the rule apply to a public officer, as such officer enters upon his duties without a contract.<sup>180</sup>

Any change in the compensation of an employé, or in the time<sup>181</sup> or manner<sup>182</sup> of ascertaining his compensation, is such an alteration as will relieve a surety, if the compensation was fixed by the contract of employment for which the surety became bound.<sup>183</sup>

Where an agent was required under his contract to make

<sup>177</sup> *Stevens v. Partridge*, 109 Ill. App. 486; *First Nat. Bank of Baltimore v. Gerke*, 68 Md. 449, 13 Atl. 358, 6 Am. St. Rep. 453; *Manufacturers' Nat. Bank of City of Newark v. Dickerson*, 41 N. J. Law, 448, 32 Am. Rep. 237; *National Mechanics' Banking Ass'n v. Conkling*, 90 N. Y. 116, 43 Am. Rep. 146, affirming 24 Hun (N. Y.) 496; *Mumford v. Railroad*, 2 Lea (Tenn.) 393, 31 Am. Rep. 616.

<sup>178</sup> *Howe Sewing Mach. Co. v. Layman*, 88 Ill. 39.

<sup>179</sup> *SAINT v. WHEELER*, 95 Ala. 362, 10 South. 539, 36 Am. St. Rep. 210; *Eastern R. Co. v. Loring*, 138 Mass. 381; *Home Savings Bank v. Traube*, 75 Mo. 199, 42 Am. Rep. 402; *City of New York v. Kelly*, 98 N. Y. 468, 50 Am. Rep. 699; *Harrisburg Savings & Loan Ass'n v. United States Fidelity & Guaranty Co.*, 197 Pa. 177, 46 Atl. 910; *American Telephone Co. v. Lennig*, 139 Pa. 595, 21 Atl. 162. Sureties for the trustee of a lodge are not discharged from liability because the membership changes and the duties of the trustee are increased thereby. *Coombs v. Harford*, 99 Me. 426, 59 Atl. 529.

<sup>180</sup> *Sacramento County Sup'rs v. Bird*, 31 Cal. 67; *Nichols v. MacLean*, 101 N. Y. 528, 5 N. E. 347, 54 Am. Rep. 730.

<sup>181</sup> *MORRISON v. ARNOS*, 65 Minn. 321, 68 N. W. 33.

<sup>182</sup> *Germania Fire Ins. Co. v. Lange*, 193 Mass. 67, 78 N. E. 746; *Bagley v. Clarke*, 7 Bosw. (N. Y.) 94. A surety for an officer is released if the principal's remuneration is changed from a salary to a commission. *Northwestern R. R. Co. v. Whinray*, 10 Exch. 77.

<sup>183</sup> A surety is not discharged if the pay of the principal is changed, without changing the contract of employment for which the surety became bound. *SAINT v. WHEELER*, 95 Ala. 362, 10 South. 539, 36 Am. St. Rep. 210; *Menard v. Davidson*, 3 La. Ann. 480; *Amicable Mut. Life Ins. Co. v. Sedgwick*, 110 Mass. 163; *Frank v. Edwards*, 8 Welsb. H. & G. 214.

weekly reports of the business transacted by him, a failure by his employer to require such reports would relieve a surety upon the agent's bond.<sup>184</sup>

*Changes in Leases.*

A change made in the covenants of a lease will relieve a surety thereon.<sup>185</sup> Where a lease provided that the lessee should be given possession upon a certain day, a guarantor of the rent will not be liable if, by another agreement between the lessor and lessee, possession was to be given upon the completion of certain improvements.<sup>186</sup> A guarantor of the rent to become due under a lease is not released by an agreement between the lessor and lessee which is collateral to the lease, such as an agreement that the improvements made by the lessee may be applied on rent.<sup>187</sup> That would be equivalent to payment by the lessee and a purchase of the improvements by the landlord, and does not change any of the terms of the lease. The assignment of a lease by the lessee does not release a guarantor of the rent, even though the lessor accepts rent from the assignee, as the assignment does not release the lessee from his liability for the rent.<sup>188</sup>

*Changes in Terms of Sale.*

Guaranties of contracts of sale cannot be enforced, if any change has been made in the subject-matter,<sup>189</sup> in the price, or other terms of the sale. The guarantor of the price of a steam engine and two boilers of a given capacity cannot be held liable for the price of an engine with three boilers of

<sup>184</sup> *Singer Mfg. Co. v. Boyette* (1905) 74 Ark. 600, 86 S. W. 673, 109 Am. St. Rep. 104; *Fidelity Mut. Life Ass'n v. Dewey*, 83 Minn. 389, 86 N. W. 423, 54 L. R. A. 945.

<sup>185</sup> *White v. Walker*, 31 Ill. 422; *Grant v. Smith*, 46 N. Y. 95; *Nichols v. Palmer*, 48 Wis. 110, 4 N. W. 137. A reduction of rent will discharge a guarantor therefor. *Penn v. Collins*, 5 Rob. (La.) 213; so will a change in the number of tenants. *Prior v. Kiso*, 81 Mo. 241.

<sup>186</sup> *Farrar v. Kramer*, 5 Mo. App. 167.

<sup>187</sup> *Morrill v. Baggott*, 157 Ill. 240, 41 N. E. 639.

<sup>188</sup> *Grommes v. Trust Co.*, 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248; *Stein v. Jones*, 18 Ill. App. 543; *Way v. Reed*, 6 Allen (Mass.) 364; *Hunt v. Gardner*, 39 N. J. Law, 530; *Damb v. Hoffman*, 3 E. D. Smith (N. Y.) 361; *Almy v. Greene*, 13 R. I. 350.

<sup>189</sup> A guarantor for the payment of money will not be liable if

greater capacity and for an additional price.<sup>100</sup> So, if the time for which credit is given is changed, the guarantor will not be liable.<sup>101</sup>

*Changes in Bonds.*

Where a dispute was referred by agreement to certain named arbitrators, sureties upon a bond given to secure the performance of the award would not be liable if two new arbitrators were added, although a majority of the original arbitrators concurred in the award.<sup>102</sup>

Where bonds are given in the course of judicial proceedings for the purpose of securing a certain object, any change made in the course of procedure as named in the bond will discharge the sureties. If new parties are added,<sup>103</sup> or if there be a discontinuance as to some of the parties,<sup>104</sup> it is an alteration.<sup>105</sup> So, if the bond has been entered into with the expectation that the matter in controversy would be determined by a court of competent jurisdiction, the sureties will not be liable if the matter be settled in some other way,<sup>106</sup> as by reference to arbitration.<sup>107</sup> An amendment to a cause of action, which has the effect of changing such cause of action, will release sureties.<sup>108</sup> Any change in the amount, or in the time of payment, will have a like effect.<sup>109</sup>

goods are delivered, instead of money. *Wright v. Johnson*, 8 Wend. (N. Y.) 512.

<sup>100</sup> *Grant v. Smith*, 46 N. Y. 93.

<sup>101</sup> *Dodge v. Meyer*, 61 Cal. 405; *Henderson v. Marvin*, 81 Barb. (N. Y.) 297; *Leeds v. Dunn*, 10 N. Y. 469.

<sup>102</sup> *Mackay v. Dodge*, 5 Ala. 388.

<sup>103</sup> *Furness v. Read*, 63 Md. 1.

<sup>104</sup> *Tarver v. Nance*, 5 Ala. 718; *Shimer v. Hightshue*, 7 Blackf. (Ind.) 238; *Harris v. Taylor*, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576.

<sup>105</sup> *Richards v. Storer*, 114 Mass. 101; *Smith v. Roby*, 6 Helsk. (Tenn.) 546.

<sup>106</sup> *Johnson v. Flint*, 34 Ala. 673; *Osborn v. Hendrickson*, 6 Cal. 175; *Baker v. Frellsen*, 32 La. Ann. 822.

<sup>107</sup> *Pirkins v. Rudolph*, 36 Ill. 306; *Bean v. Parker*, 17 Mass. 591; *Moore v. Bowmaker*, 3 Price, 214.

<sup>108</sup> *Langley v. Adams*, 40 Me. 125; *Willis v. Crooker*, 1 Pick. (Mass.) 204; *Post v. Shafer*, 63 Mich. 85, 29 N. W. 519; *Sage v. Strong*, 40 Wis. 575; *Hyer v. Smith*, 3 Cranch, C. C. (U. S.) 437, Fed. Cas. No. 6,979.

<sup>109</sup> *Leonard v. Gibson*, 6 Ill. App. 503.

*Immaterial Alterations.*

As has been said, an alteration, in order to have the effect of discharging a surety, must be material;<sup>200</sup> but it does not rest with the party making the alteration to decide whether or not it is material.<sup>201</sup> Any change which neither adds to nor takes away from the obligation of the surety will not release him;<sup>202</sup> nor will a change made to make the instrument conform to the intention of the parties.<sup>203</sup>

**DISCHARGE BY EXTENSION OF TIME TO PRINCIPAL.**

**108. An extension of the time of payment or performance, given by the creditor or obligee to the principal, will discharge a surety from liability for such payment or performance; provided:**

**(a) The creditor or obligee has knowledge of the relation.**

<sup>200</sup> *Humphreys v. Crane*, 5 Cal. 173; *Hunt v. Adams*, 6 Mass. 519; *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356; *Brown v. Straw*, 6 Neb. 536, 29 Am. Rep. 369; *Blair v. Bank of Tennessee*, 11 Humph. (Tenn.) 84.

<sup>201</sup> *United States v. Case*, Fed. Cas. No. 14,743.

<sup>202</sup> *Rudé sill v. County Court*, 85 Ill. 446; *Western Building & Loan Ass'n v. Fitzmaurice*, 7 Mo. App. 283; *Kinney v. Schmitt*, 12 Hun (N. Y.) 521; *Hand Mfg. Co. v. Marks*, 36 Or. 523, 52 Pac. 512, 53 Pac. 1072, 59 Pac. 549. A guaranty signed by one person began, "We hereby guaranty." A change of "we" to "I" would be an immaterial alteration. *Kline v. Raymond*, 70 Ind. 271. The following, also, were regarded as immaterial: Adding the exact consideration after the words "for value received." *Gardiner v. Harback*, 21 Ill. 129. Inserting a name in the body of the instrument. *State ex rel. McCarty v. Pepper*, 31 Ind. 76; *Smith v. Crooker*, 5 Mass. 533. Changing the name of the payee in a promissory note from one firm name to another, the partnership being the same in each case. *Arnold v. Jones*, 2 R. I. 345. An interlineation which more accurately described the property designated. *Rowley v. Jewett*, 56 Iowa, 492, 9 N. W. 353. Erasing a forged name. *York County Mut. Fire Ins. Co. v. Brooks*, 51 Me. 506. Adding the word "agent" to the signature of a promissory note. *Manufacturers' & Merchants' Bank v. Follett*, 11 R. I. 92, 23 Am. Rep. 418. Adding attesting witnesses to principal's signature. *Heard v. Merritt*, 121 Ga. 437, 49 S. E. 292. Procuring the signature of a witness. *Hall v. Weaver* (O. C.) 34 Fed. 104.

<sup>203</sup> *Mattingly v. Riley*, 20 Ky. Law Rep. 1621, 49 S. W. 799; *Ames v. Colburn*, 11 Gray (Mass.) 390, 71 Am. Dec. 723.

- (b) The surety does not consent.
- (c) The extension is given for a consideration.
- (d) The extension is for a definite time.
- (e) The creditor or obligee does not reserve his rights against the surety.
- (f) The surety has no security.

### *Reason of the Rule.*

The rule that an extension, given by the creditor to the principal, will discharge a surety on the contract,<sup>204</sup> might re-

<sup>204</sup> *Everett v. United States*, 6 Port. (Ala.) 166, 30 Am. Dec. 584; *King v. State Bank*, 9 Ark. (4 Eng.) 185, 47 Am. Dec. 739; *Capital Savings Bank v. Reel*, 62 Cal. 418; *Deming v. Norton*, Kirby (Conn.) 397; *Clark v. Gerstley*, 26 App. D. C. (D. C.) 205; *Bowen v. Darby*, 14 Fla. 202; *Randolph v. Fleming*, 59 Ga. 776; *Dodgson v. Henderson*, 113 Ill. 360; *Flynn v. Mudd*, 27 Ill. 323; *Post v. Losey*, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; *Kelly v. Gillespie*, 12 Iowa, 55, 79 Am. Dec. 516; *Rose v. Williams*, 5 Kan. 483; *Clark v. Patton*, 27 Ky. (4 J. J. Marsh.) 83, 20 Am. Dec. 203; *Allison v. Thomas*, 29 La. Ann. 732; *Thomas v. Stetson*, 59 Me. 229; *Clagett v. Salmon*, 5 Gill & J. (Md.) 314; *Guild v. Butler*, 127 Mass. 386; *Todd v. Greenwood School Dist.*, 40 Mich. 294; *SMITH v. SHELDEN*, 35 Mich. 42, 24 Am. St. Rep. 529; *Travers v. Dorr*, 60 Minn. 173, 62 N. W. 269; *Meggett v. Baum*, 57 Miss. 22; *Stillwell v. Aaron*, 69 Mo. 539, 33 Am. Rep. 517; *Dillon v. Russell*, 5 Neb. 484; *Grafton Bank v. Woodward*, 5 N. H. 99, 20 Am. Dec. 566; *MURRAY v. MARSHALL*, 94 N. Y. 611; *Ducker v. Rapp*, 67 N. Y. 464; *Jenkins v. Daniel*, 125 N. C. 161, 34 S. E. 239, 74 Am. St. Rep. 632; *Miller v. Spain*, 41 Ohio St. 376; *Appeal of Grayson*, 108 Pa. 581; *Uhler v. Applegate*, 26 Pa. (2 Casey) 140; *Smith v. Tunno*, 1 McCord, Eq. (S. C.) 443, 16 Am. Dec. 617; *Apperson v. Cross*, 52 Tenn. (5 Heisk.) 431; *First Nat. Bank of Victoria v. Skidmore* (Tex. Civ. App. 1895) 30 S. W. 564; *Baskin v. Godbe*, 1 Utah, 28; *Peake v. Dorwin*, 25 Vt. 28; *Hill v. Bull*, Gilmer (Va.) 149; *Glenn v. Morgan*, 23 W. Va. 467; *MOULTON v. POSTEN*, 52 Wis. 169, 8 N. W. 621; *Uniontown Bank v. Mackey*, 140 U. S. 220, 11 Sup. Ct. 844, 35 L. Ed. 485; *POOLEY v. HARRIDINE*, 7 El. & Bl. 431; 40 Cent. Dig. col. 1856.

In Maryland, New Jersey, and England, where the principal and surety are co-makers of a note, the defense is allowed in a court of equity only. *Yates v. Donaldson*, 5 Md. 389, 61 Am. Dec. 283; *Anthony v. Fritts*, 45 N. J. Law, 1; *Manley v. Boycott*, 2 El. & Bl. 46.

If a mortgagee extends the time of payment by agreement with a grantee of the mortgaged premises who has assumed the debt, the original mortgagor is discharged. *Paine v. Jones*, 76 N. Y. 274, Id., 14 Hun (N. Y.) 577. An extension given to the principal will discharge one who has mortgaged his property to secure the debt.

sult from the fact that an extension of time is an alteration of a very material term in the contract, namely, the time of payment or performance.<sup>205</sup> The contract, as extended, is a new one, to which the surety is not a party, and the rule as laid down in the preceding section would apply; but there are additional reasons why an extension of time will discharge a surety. The law gives a surety, who has been compelled to make payment on account of the default of the principal, the right to collect whatever he has paid from the principal,<sup>206</sup> and the surety is not obliged to wait until requested to make payment, but may pay as soon as the debt is due, and proceed against the principal. If the creditor and principal make an

*Diehl v. Davis* (Kan. 1907) 88 Pac. 532; *METZ v. TODD*, 36 Mich. 473; *Bank of Albion v. Burns*, 46 N. Y. 170; *Ayres v. Wattson*, 57 Pa. (7 P. F. Smith) 360. Or one who has pledged property. *Home Nat. Bank of Chicago v. Waterman*, 30 Ill. App. 535, affirmed 134 Ill. 461, 29 N. E. 503; *Price v. Dime Savings Bank*, 124 Ill. 317, 15 N. E. 754, 7 Am. St. Rep. 387; *Burnap v. National Bank*, 96 N. Y. 125. If a buyer of property has assumed a debt of his seller, an extension of the time of payment of the debt, given to the buyer, will discharge the seller. *Calvo v. Davies*, 73 N. Y. 211, 29 Am. St. Rep. 130, affirming 8 Hun (N. Y.) 222; *Brill v. Holle*, 53 Wis. 537, 11 N. W. 42. So an extension given to a partner who has assumed the indebtedness of the firm will discharge the others. *Leithauser v. Baumelster*, 47 Minn. 151, 49 N. W. 600, 28 Am. St. Rep. 336; *Miller v. Thorn*, 56 N. Y. 402; *Dodd v. Dreyfus*, 17 Hun (N. Y.) 600; *Id.*, 57 How. Prac. (N. Y.) 319.

A guarantor will be discharged by an extension given to his principal. *Gross v. Parrott*, 16 Cal. 143; *White v. Ault*, 19 Ga. 551; *White v. Walker*, 31 Ill. 422; *Hurd v. Marple*, 10 Ill. App. (10 Bradw.) 418; *Springer Lithographing Co. v. Graves*, 97 Iowa, 39, 66 N. W. 66; *Dixon v. Spencer*, 59 Md. 246; *Bishop v. Eaton*, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437; *Challenge Corn Planter Co. v. Diel*, 92 Hun, 165, 36 N. Y. Supp. 364; *Barnett v. Wing*, 62 Hun, 125, 16 N. Y. Supp. 567; *Rutherford v. Brachman*, 40 Ohio St. 604; *Campbell v. Baker*, 46 Pa. (10 Wright) 243; *Robinson v. Dale*, 38 Wis. 330; *Russell v. Perkins*, 1 Mason (U. S.) 368, Fed. Cas. No. 12,160; 25 Cent. Dig. col. 152. So will an indorser. *Inge v. Bank of Mobile*, 8 Port. (Ala.) 108; *McGuire v. Woolbridge*, 6 Rob. (La.) 47; *Veazie v. Carr*, 3 Allen (Mass.) 14; *Siebeneck v. Anchor*, 111 Pa. 187, 2 Atl. 485; *Bank of United States v. Hatch*, 6 Pet. (U. S.) 250, 8 L. Ed. 387. See post, c. VII, note 143, that an extension, granted by one co-surety to the principal, will take away the right to contribution.

<sup>205</sup> See, note 139, *supra*.

<sup>206</sup> See post, § 154.

agreement extending the time of payment, and the surety tenders payment to the creditor, the creditor would have no right to receive it, as he, by his own agreement, has postponed the time. If the creditor refuses to receive payment from the surety when tendered, the right of the surety to recover from the principal is postponed,<sup>207</sup> and in the meantime the financial ability of the principal might change. If the surety could pay at the time the debt was due originally, he might recover from a solvent principal; but delay may render the principal insolvent, and the surety would be injured, and the law does not require the surety to take risks of this character. If the creditor should accept payment from the surety when tendered, and the surety then should seek indemnity from the principal, the principal could say that by the new agreement the time of payment had been extended, and he could not be called upon to pay until the expiration of the additional time.<sup>208</sup> This would have the same effect, as to possible insolvency of the principal, as in the former case. An extension of time is equivalent to payment by the principal, and a new loan made to the principal by the creditor. Payment of the debt by the principal would discharge the surety;<sup>209</sup> and the latter is not a party to, nor bound by, the subsequent transaction.

An extension given to the principal by one co-obligee, which is the act of all the co-obligees, will discharge a surety for the debt.<sup>210</sup>

*Benefit to Surety.*

As in the case of an alteration,<sup>211</sup> it is immaterial that the extension appears to be for the benefit of the surety,<sup>212</sup> that the delay will enable the principal to pay the debt, while he was unable to meet the obligation at maturity, and, had the extension not been granted, the surety would have been called

<sup>207</sup> *Waters v. Simpson*, 7 Ill. 570; *Davis v. People*, 6 Ill. 409.

<sup>208</sup> *ENGLISH v. DARLEY*, 2 Bos. & P. 61; *SAMUELL v. HOWARTH*, 3 Mer. 272.

<sup>209</sup> See post, § 132.

<sup>210</sup> *Clark v. Patton*, 4 J. J. Marsh. (Ky.) 33, 20 Am. Dec. 203.

<sup>211</sup> See note 123, *supra*.

<sup>212</sup> *Hallock v. Yankey*, 102 Wis. 41, 78 N. W. 156, 72 Am. St. Rep. 861; *United States v. Hillegas*, 3 Wash. C. C. 70, Fed. Cas. No. 15,366; *Greenwood v. Francis* [1899] 1 Q. B. 312.



upon for payment. The fact nevertheless remains that the contract, as extended, is not his contract, and the courts will not speculate whether a surety has been benefited or not, but will presume injury.<sup>213</sup> Every person has the right to make his own contracts in his own way, so long as they are legal, and no one else has a right to make them for him without his consent.<sup>214</sup>

*Extension by Arbitrators.*

If controversies in regard to the contract for which a surety is liable are submitted to arbitration by the creditor and principal, and the award makes the time of payment at a later date than that provided in the contract, the surety no longer will be liable.<sup>215</sup>

*Continuance of Suits against Principal.*

After the creditor brings suit against the principal, a surety may be discharged by a continuance given to the principal; <sup>216</sup> but every ordinary stipulation, during the litigation, extending time, will not affect the liability of the surety.

*Extension by Legislative Enactment.*

There is a conflict whether a statutory extension of time granted to the principal will discharge a surety. In some jurisdictions it is held that a state cannot modify a contract between the state and a citizen without the consent of the latter.<sup>217</sup> In other jurisdictions the extension is regarded as or-

<sup>213</sup> *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 180; *Rathbone v. Warren*, 10 Johns. (N. Y.) 587. Where the contract of the sureties was that they should pay within one month after demand, they did not become liable until demand; and any dealing between the principal and creditor which extended the time, where the time expired before demand, the sureties were not discharged. *PRENDERGAST v. DEVEY*, 6 Madd. 124. It has been held, in a few cases, that a surety is not discharged by an extension for a less period than a judgment could have been recovered against the principal. *Fletcher v. Gamble*, 3 Ala. 335; *Barker v. McClure*, 2 Blackf. (Ind.) 14; *Gardner v. Van Norstrand*, 13 Wis. 543; *HULME v. COLES*, 2 Sim. 12.

<sup>214</sup> *SAMUELL v. HOWARTH*, 3 Mer. 272; *Rees v. Barrington*, 2 Ves. Jr. 540.

<sup>215</sup> *Coleman v. Warde*, 6 N. Y. 44.

<sup>216</sup> *Wybrants v. Lutch*, 24 Tex. 309.

<sup>217</sup> *People v. McHatton*, 7 Ill. 638; *State, to Use of Carroll County*,

dinary legislation for the public good, which the sureties might naturally expect,<sup>218</sup> and not a contract with the principal, and his sureties remain liable; that there is no consideration for a statutory extension, and the act is repealable.<sup>219</sup>

*Extension as to Part of Debt.*

A surety may be released as to a part only of the indebtedness,<sup>220</sup> as would be the case of a debt payable in installments. An extension as to one installment will not affect the liability of the surety as to the other installments.<sup>221</sup> As to them he has the same right to make payment and collect from the principal as he had before.

*Knowledge of the Relation by Creditor or Consent by Surety*

The effect of lack of knowledge<sup>222</sup> by the creditor of the existence of the relation of principal and surety, and of the effect of consent given by the surety,<sup>223</sup> has been made the subject of previous sections, and nothing will be said here as to those points.

*Extension Must Be by a Binding Agreement.*

In order that an extension may have the effect of discharging a surety from liability, the agreement for an extension must be a binding one,<sup>224</sup> one that the principal can enforce

v. Roberts, 68 Mo. 231, 30 Am. Rep. 788; Johnson v. Hacker, 55 Tenn. (S. Heisk.) 388; King County v. Ferry, 5 Wash. 536, 32 Pac. 538, 19 L. R. A. 500, 34 Am. St. Rep. 880; Pybus v. Gibb, 6 El. & Bl. 902; 40 Cent. Dig. col. 1864.

<sup>218</sup> See ante, c. IV, note 44.

<sup>219</sup> State v. Carleton, 1 Gill (Md.) 249; STATE, to Use of Holmes County, v. SWINNEY, 60 Miss. 39, 45 Am. Rep. 405; Worth v. Cox, 89 N. C. 44; Commonwealth v. Holmes, 25 Grat. (Va.) 771.

<sup>220</sup> Robinson v. Dale, 38 Wis. 330.

<sup>221</sup> Ducker v. Rapp, 67 N. Y. 464.

<sup>222</sup> See ante, § 102.

<sup>223</sup> See ante, § 105.

<sup>224</sup> Williams v. Covillaud, 10 Cal. 419; Byers v. Hussey, 4 Colo. 515; Fridenberg v. Robinson, 14 Fla. 130; Grabfelder v. Willis, 10 Ill. App. (10 Bradw.) 330; Anderson v. Mannon, 46 Ky. (7 B. Mon.) 217; John M. Parker & Co. v. Guillot (La. 1907) 42 South. 782; Oberndorff v. Union Bank, 31 Md. 126, 1 Am. Rep. 31; Roberts v. Stewart, 31 Miss. 664; Rucker v. Robinson, 38 Mo. 154, 90 Am. Dec. 412; Lowman v. Yates, 37 N. Y. 601; Thayer v. King, 31 Hun (N. Y.) 437; Thompson v. Marshall, 2 Ohio Dec. 506; Brubaker v.

against the creditor, and that ties the hands of the creditor,<sup>225</sup> or the surety cannot be prejudiced. The test whether an extension is binding is whether an action could be maintained before the time of the alleged extension had expired.<sup>226</sup> If the creditor has annexed conditions to his agreement for an extension, such conditions must be performed fully before a surety can claim his discharge;<sup>227</sup> but, to be binding, it is not requisite that the agreement for an extension be in any particular form,<sup>228</sup> and it is a matter of fact for the jury to determine whether an extension has been granted.<sup>229</sup>

An extension procured by the fraudulent representation of the principal that the surety has consented thereto is not binding, and the surety is not discharged.<sup>230</sup>

If a specialty cannot be discharged by parol, it follows that an oral extension of a specialty will not discharge a surety thereon, as such agreement for an extension would not be binding.<sup>231</sup> Likewise an extension granted by an agent who

Okeson, 36 Pa. (12 Casey) 519; *White v. Summers*, 60 Tenn. (1 Baxt.) 154; *Burke v. Cruger*, 8 Tex. 66, 59 Am. Dec. 102; *Creath v. Sims*, 46 U. S. (5 How.) 192, 12 L. Ed. 110. The surety must show that the agreement for an extension was a binding one. *Clark v. Gerstley*, 26 App. D. C. (D. C.) 205. Mere indulgence, without a valid contract of extension, will not suffice. *Barber v. Ruggles*, 87 S. W. 785, 27 Ky. Law Rep. 1077.

<sup>225</sup> *Berry v. Pullen*, 69 Me. 101, 31 Am. Rep. 248; *Hosea v. Rowley*, 57 Mo. 357; *McKecknie v. Ward*, 58 N. Y. 541, 17 Am. Rep. 281. A notification by the creditor to the principal that if the latter does not pay by a certain time he will be sued is not an extension. *Nall v. Springfield*, 9 Bush (Ky.) 673.

<sup>226</sup> *Howell v. Sevier*, 1 Lea (Tenn.) 360, 27 Am. Rep. 771; *MOULTON v. POSTEN*, 52 Wis. 169, 8 N. W. 621.

<sup>227</sup> *Thorn v. Pinkham*, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335; *Harnsberger's Ex'r v. Geiger*, 3 Grat. (Va.) 144.

<sup>228</sup> *Lambert v. Shitler*, 62 Iowa, 72, 17 N. W. 187; *Lime Rock Bank v. Mallett*, 42 Me. 349; *Union Bank v. McClung*, 9 Humph. (Tenn.) 98.

<sup>229</sup> *Brooks v. Wright*, 13 Allen (Mass.) 72.

<sup>230</sup> *Dwinnell v. McKibben*, 93 Iowa, 331, 61 N. W. 985; *Bebout v. Rodle*, 38 Ohio St. 500; *McDougall v. Walling*, 15 Wash. 78, 45 Pac. 668; 55 Am. St. Rep. 871. See note 240, *infra*. It is necessary that the creditor act promptly on discovery of the fraud, or he may be deemed to consent to the extension without the surety's consent. *Burnap v. Robertson*, 75 Ga. 689.

<sup>231</sup> *Carr v. Howard*, 8 Blackf. (Ind.) 190; *DAVEY v. PRENDER-*

has no such authority, as authority for collection only, would not be binding upon the creditor, and a surety on a note so intrusted to an agent would remain liable.<sup>222</sup>

The extension must be voluntary, on the part of the creditor, in order to discharge a surety. If compulsory, as by an injunction obtained by the principal against the creditor, the rights of the latter are not affected.<sup>223</sup> The agreement to extend must be made with the principal. An agreement between the creditor and a stranger will not discharge a surety.<sup>224</sup> Thus, an agreement made by the holder of a bill of exchange to extend the time of payment, in consideration of another's agreement to see it paid, will not discharge the drawer of the bill.<sup>225</sup>

#### *Implied Extensions.*

An agreement for an extension may be implied.<sup>226</sup> The giving of a negotiable instrument by the principal, payable at a future time, whether in renewal of an old note,<sup>227</sup> or for any other indebtedness,<sup>228</sup> discharges a surety for the indebtedness in its original form;<sup>229</sup> but a surety would not be discharged if the creditor has taken a note containing forged

GRASS, 5 Barn. & Ald. 187. In some states a sealed instrument can be discharged by an oral agreement, and in such states a surety on a bond would be discharged by an oral extension. *Leavitt v. Savage*, 16 Me. 72.

<sup>222</sup> *Lawrence v. Johnson*, 64 Ill. 351.

<sup>223</sup> *Hodges v. Gewin*, 6 Ala. 478.

<sup>224</sup> *Clark v. Birley*, 41 Ch. Div. 422.

<sup>225</sup> It is not the law that a surety is discharged whenever the creditor has placed himself in a position in which it is against his interest to sue the principal. *FRAZER v. JORDAN*, 8 El. & Bl. 303.

<sup>226</sup> *Place v. McIlvain*, 38 N. Y. 96, 97 Am. Dec. 777.

<sup>227</sup> *Simmons v. Gulse*, 46 Ga. 473; *Dixon v. Spencer*, 59 Md. 246; *First Nat. Bank v. Leavitt*, 65 Mo. 562; *Greene v. Bates*, 74 N. Y. 333.

<sup>228</sup> *Bangs v. Mosher*, 23 Barb. (N. Y.) 479; *Armistead v. Ward*, 2 Patt. & H. 504; *Smith v. Crease*, 2 Cranch, C. C. (U. S.) 481, Fed. Cas. No. 13,031; *Clarke v. Henty*, 3 Younge & C. Ch. 187.

<sup>229</sup> *Price v. Dime Sav. Bank*, 124 Ill. 317, 15 N. E. 754, 7 Am. St. Rep. 367; *Chickasaw County v. Pitcher*, 36 Iowa, 593; *Lee v. Sewall*, 2 La. Ann. 940; *Delaware, L. & W. R. Co. v. Burkhard*, 36 Hun (N. Y.) 57; *Maler v. Canavan*, 57 How. Prac. (N. Y.) 504; *First Nat. Bank of Seattle v. Harris*, 7 Wash. 139, 34 Pac. 466; *Weed Sewing Mach. Co. v. Oberreich*, 38 Wis. 325.

signatures in renewal of the note for which the surety was liable,<sup>240</sup> as a binding agreement would not be effected. However, a surety in such a case might be discharged if the creditor took no steps upon the discovery of the fraud perpetrated upon him.<sup>241</sup>

The surety would not be discharged by the mere fact that the creditor took collateral security which matured after the debt for which the surety was liable,<sup>242</sup> as that would not imply necessarily an extension of time; nor would the fact that the principal has paid interest, even at a higher rate,<sup>243</sup> after the maturity of a note, indicate that an agreement for an extension had been made.<sup>244</sup> It might be simple forbearance on the part of the creditor; but taking interest in advance raises a presumption that an agreement has been made to extend the time of payment during the time for which the interest has been paid,<sup>245</sup> but it is not conclusive.

<sup>240</sup> *Albright v. Griffin*, 78 Ind. 182; *HUBBARD v. HART*, 71 Iowa, 668, 33 N. W. 233; *Bangs v. Strong*, 10 Paige (N. Y.) 11; *Ritter v. Singmaster*, 73 Pa. 400; *First Nat. Bank of Athens v. Buchanan*, 87 Tenn. (3 Pickle) 32, 9 S. W. 202, 1 L. R. A. 199, 10 Am. St. Rep. 617; *Officer v. Marshall*, 9 Tex. Civ. App. 428, 29 S. W. 246. See note 230, *supra*. Granting an extension upon receiving a bond with forged signatures of sureties thereon will not be binding upon the creditor. *Lyttle v. Cozad*, 21 W. Va. 183.

<sup>241</sup> *Kirby v. Landis*, 54 Iowa, 150, 6 N. W. 173. And see *Burnap v. Robertson*, 75 Ga. 689.

<sup>242</sup> *German Ins. & Savings Inst. v. Vable*, 28 Ill. App. 557; *Merri-man v. Barker*, 121 Ind. 74, 22 N. E. 992; *Roberson v. Blevins*, 57 Kan. 50, 45 Pac. 63; *Brengle v. Bushey*, 40 Md. 141, 17 Am. Rep. 586; *Sigourney v. Wetherell*, 6 Metc. (Mass.) 553; *Noll v. Oberhellmann*, 20 Mo. App. 336; *Remsen v. Graves*, 41 N. Y. 471; *Elwood v. Diefendorf*, 5 Barb. (N. Y.) 398; *Shubrick's Ex'rs v. Russell*, 1 Desaus. (S. C.) 315; *Pendexter v. Vernon*, 9 Humph. (Tenn.) 84; *Burke v. Cruger*, 8 Tex. 66, 59 Am. Dec. 102; *United States v. Hodge*, 47 U. S. (6 How.) 279, 12 L. Ed. 437; 40 Cent. Dig. col. 1872.

<sup>243</sup> *Stearns v. Sweet*, 78 Ill. 446.

<sup>244</sup> *Jarvis v. Hyatt*, 43 Ind. 163.

<sup>245</sup> *Scott v. Saffold*, 37 Ga. 384; *Woodburn v. Carter*, 50 Ind. 376; *New Hampshire Savings Bank v. Colcord*, 15 N. H. 119, 14 Am. Dec. 685; *People's Bank v. Pearsons*, 30 Vt. 711. See note 252, *infra*. An indorsement on an overdue note of a payment more than enough to pay accrued interest would not indicate necessarily an agreement for an extension. The surplus might have been paid on the principal debt. *Vore v. Woodford*, 29 Ohio St. 245.

*Consideration—Necessity.*

As an agreement without consideration is void,<sup>246</sup> and as an agreement for an extension, in order to release a surety, must be a binding one, it follows that an agreement for an extension, which is not supported by a consideration, will not discharge a surety.<sup>247</sup> A promise of delay, without more, given to the principal by the creditor,<sup>248</sup> would not prevent the creditor from proceeding immediately against the principal; nor would it prevent the creditor from accepting payment, if tendered by the surety.

*Consideration—Sufficiency.*

The actual payment of interest in advance,<sup>249</sup> or giving a note in advance for the interest,<sup>250</sup> would be a sufficient con-

<sup>246</sup> Clark, *Contracts* (2d Ed.) p. 110.

<sup>247</sup> SAINT v. WHEELER, 95 Ala. 362, 10 South. 539, 36 Am. St. Rep. 210; Hazard v. White, 26 Ark. 155; Bowling v. Chambers, 20 Colo. App. 113, 77 Pac. 16; Fridenberg v. Robinson, 14 Fla. 130; Bonner v. Nelson, 57 Ga. 433; Gllickauf v. Hirschorn, 73 Ill. 574; Waters v. Simpson, 7 Ill. (2 Gilman) 570; Lindeman v. Rosenfield, 67 Ind. 246, 33 Am. Rep. 79; Byers v. Harris, 67 Iowa, 685, 25 N. W. 879; Eaton v. Whitmore, 3 Kan. App. 760, 45 Pac. 450; Brinagar's Adm'r v. Phillips, 40 Ky. (1 B. Mon.) 283, 36 Am. Dec. 575; Hule v. Bailey, 16 La. 213, 35 Am. Dec. 214; Leavitt v. Savage, 16 Me. (4 Shep.) 72; Oberndorff v. Union Bank, 31 Md. 126, 1 Am. Rep. 31; Jennings v. Chase, 10 Allen (Mass.) 526; Newell v. Hamer, 5 Miss. (4 How.) 684, 35 Am. Dec. 415; Regan v. Williams, 185 Mo. 620, 84 S. W. 959, 105 Am. St. Rep. 600; Smith v. Mason, 44 Neb. 610, 63 N. W. 41; Hoyt v. French, 24 N. H. (4 Foster) 198; Meginnis v. Nightingale, 34 N. J. Law, 461; Olmstead v. Latimer, 158 N. Y. 313, 53 N. E. 5, 43 L. R. A. 685; Gahn v. Niemcewicz, 11 Wend. (N. Y.) 312; Van Rensselaer v. Kirkpatrick, 46 Barb. (N. Y.) 194; Farmers' Bank of Canton v. Reynolds, 13 Ohio, 84; Schlusel v. Warren, 2 Or. 17; Zane v. Kennedy, 73 Pa. (23 P. F. Smith) 132; Ashton v. Sproule, 35 Pa. (11 Casey) 493; Parnell v. Price, 3 Rich. Law (S. C.) 121; Benson v. Phipps (Tex. Civ. App.) 28 S. W. 359; Joslyn v. Smith, 13 Vt. 353; Hunter's Adm'r v. Jett, 4 Rand. (Va.) 104; Fay v. Tower, 58 Wis. 286, 16 N. W. 558; McLemore v. Powell, 12 Wheat. (U. S.) 554, 6 L. Ed. 726; 40 Cent. Dig. col. 1909.

<sup>248</sup> Jones v. Cottrell (Iowa, 1906) 109 N. W. 793; John M. Parker & Co. v. Guillot (La. 1907) 42 South. 782. A stay of execution will not discharge a surety. Houston v. Hurley, 2 Del. Ch. 247; Miller v. Porter, 24 Tenn. (5 Humph.) 294. See post, § 127.

<sup>249</sup> Scott v. Saffold, 37 Ga. 384; Maher v. Lanfrom, 86 Ill. 513;

<sup>250</sup> Robinson v. Miller, 2 Bush. (Ky.) 179.

sideration for an agreement to extend the time of payment, and a surety for the debt would be discharged; but the mere acceptance of interest in advance, without an agreement to extend, would not discharge a surety,<sup>251</sup> though it would be prima facie evidence of an agreement to extend.<sup>252</sup> An agreement to pay an increased rate of interest<sup>253</sup> would be a sufficient consideration; but the decisions are not harmonious whether an agreement to pay interest at the same or at a lower rate would be sufficient.<sup>254</sup> Some courts hold that by such an agreement the creditor has relinquished his right to demand payment, and has secured a valuable right in having his money placed at interest, and that the debtor has relinquished the privilege of paying the debt at any time and stopping the interest; this constituting a consideration for the extension.<sup>255</sup> Other courts consider that the promise to pay interest is a promise to do what the debtor legally was bound

Kaler v. Hise, 79 Ind. 301; Christner v. Brown, 16 Iowa, 130; Hubbard v. Ogden, 22 Kan. 363; Lime Rock Bank v. Mallett, 34 Me. 547, 56 Am. Dec. 673; Dubuisson v. Folkes, 30 Miss. 432; Merchants' Ins. Co. of St. Joseph v. Hauck, 83 Mo. 21; New Hampshire Savings Bank v. Colcord, 15 N. H. 119, 41 Am. Dec. 685; NATIONAL EAGLE BANK v. HUNT, 16 R. I. 148, 13 Atl. 115; Gardner v. Gardner, 23 S. C. 588; Dunham v. Downer, 31 Vt. 249; Binnian v. Jennings, 14 Wash. 677, 45 Pac. 302; Glenn v. Morgan, 23 W. Va. 467.

<sup>251</sup> McGlassen v. Tyrrell, 5 Ariz. 51, 44 Pac. 1088; Waters v. Simpson, 7 Ill. 570; Agricultural Bank, President, etc., of, v. Bishop, 72 Mass. (6 Gray) 317; Haydenville Savings Bank v. Parsons, 133 Mass. 53; Morse v. Blanchard, 117 Mich. 37, 75 N. W. 93; American Nat. Bank v. Love, 62 Mo. App. 378; Gard v. Neff, 39 Ohio St. 607; Bank of Uniontown v. Mackey, 140 U. S. 220, 11 Sup. Ct. 844, 35 L. Ed. 485.

<sup>252</sup> Scott v. Saffold, 37 Ga. 384; Woodburn v. Carter, 50 Ind. 376; Coster v. Mesner, 58 Mo. 549. See note 245, supra.

<sup>253</sup> Dodgson v. Henderson, 113 Ill. 360; Maher v. Lanfrom, 86 Ill. 513; Fawcett v. Freshwater, 31 Ohio St. 637.

<sup>254</sup> See Stearns, Law of Suretyship, p. 117. Of course, an agreement to pay the interest already due would not be a sufficient consideration. Kerns v. Ryan, 26 Ill. App. 177; Dennis v. Piper, 21 Ill. App. 169; Halstead v. Brown, 17 Ind. 202; Wilson v. Powers, 130 Mass. 127.

<sup>255</sup> Stallings v. Johnson, 27 Ga. 564; Dodgson v. Henderson, 113 Ill. 360; Hunt v. Postlewait, 28 Iowa, 427; Rumberger v. Golden, 99 Pa. 34; Calvert v. Good, 95 Pa. 65; Stone's River Nat. Bank v. Walter, 104 Tenn. 11, 55 S. W. 301; Benson v. Phipps, 87 Tex. 578,

to do without any agreement, and that it is not a sufficient consideration for an agreement for an extension.<sup>256</sup> There is also a lack of harmony in the decisions whether the payment of, or an agreement to pay, usurious interest, is a sufficient consideration; this lack of harmony resulting very largely from the effect of usury on the contract under the statutes of the various states. Most courts hold that if the usury be paid in advance,<sup>257</sup> or a note be given therefor,<sup>258</sup> a surety for the debt is discharged; for, though the principal might take advantage of the usury, the creditor is bound. In other courts, the payment of usury being illegal, the agreement for an extension is not binding, and a surety for the debt remains liable.<sup>259</sup> If there be a promise only to pay usury, the surety is not discharged,<sup>260</sup> though the usury actually be paid afterwards.<sup>261</sup>

29 S. W. 1061, 47 Am. St. Rep. 128; *Parsons v. Harrold*, 46 W. Va. 122, 32 S. E. 1002.

<sup>256</sup> *Abel v. Alexander*, 45 Ind. 523, 15 Am. Rep. 270; *Robinson v. Miller*, 2 Bush. (Ky.) 179; *Chute v. Pattee*, 37 Me. 102; *Willson v. Powers*, 130 Mass. 127; *Fowler v. Brooks*, 18 N. H. 240; *Kellogg v. Olmsted*, 25 N. Y. 189; *Reynolds v. Ward*, 5 Wend. (N. Y.) 501.

<sup>257</sup> *Camp v. Howell*, 37 Ga. 312; *Myers v. First Nat. Bank*, 78 Ill. 257; *Lemmon v. Whitman*, 75 Ind. 318, 39 Am. Rep. 150; *Coriell v. Allen*, 13 Iowa, 289; *Wild v. Howe*, 74 Mo. 551; *Grafton Bank v. Woodward*, 5 N. H. 99, 20 Am. Dec. 566; *Church v. Maloy*, 70 N. Y. 63; *Billington v. Wagoner*, 33 N. Y. 31; *Scott v. Harris*, 76 N. C. 205; *Osborn v. Low*, 40 Ohio St. 347; *Mann v. Brown*, 71 Tex. 241, 9 S. W. 111; *Armistead v. Ward*, 2 P. & H. 504; *Parsons v. Harrold*, 46 W. Va. 122, 32 S. E. 1002; *MOULTON v. POSTEN*, 52 Wis. 169, 8 N. W. 621; *Vary v. Norton* (C. C.) 6 Fed. 808.

<sup>258</sup> *MOULTON v. POSTEN*, 52 Wis. 169, 8 N. W. 621.

<sup>259</sup> *Prather v. Gammon*, 25 Kan. 379; *Cornwell v. Holly*, 5 Rich. Law (S. C.) 47; *Howell v. Sevier*, 1 Lea (Tenn.) 360, 27 Am. Rep. 771.

<sup>260</sup> *Cox v. Mobile Co.*, 37 Ala. 320; *Green v. Lake*, 2 Mackey (D. C.) 162; *Wittmer v. Ellison*, 72 Ill. 301; *Hunt v. Postlewait*, 28 Iowa, 427; *Pyke's Adm'r v. Clark*, 42 Ky. (3 B. Mon.) 262; *Berry v. Pullen*, 69 Me. 101, 31 Am. Rep. 248; *Roberts v. Stewart*, 31 Miss. 664; *First Nat. Bank of Charlotte v. Lineberger*, 83 N. C. 454, 35 Am. Rep. 582; *Hill v. Calloway*, 1 Ohio Dec. 59; *Neel v. Commonwealth* (Pa. 1886) 7 Atl. 74; *Cornwell v. Holly*, 5 Rich. Law (S. C.) 47; *Willson v. Langford*, 5 Humph. (Tenn.) 320; *Payne v. Powell*, 14 Tex. 600; *Burgess v. Dewey*, 33 Vt. 618; *Melzwinkle v. Jung*, 30 Wis. 361, 11 Am. Rep. 572; *Contra, Parmelee v. Williams*, 72 Ga. 42.

<sup>261</sup> *Howell v. Sevier*, 1 Lea (Tenn.) 360, 27 Am. Rep. 771; *Smith v. Hyde*, 36 Vt. 303.



A partial payment, at or after maturity, on the secured debt,<sup>262</sup> or the full payment of another debt which is due,<sup>263</sup> would not be sufficient consideration for an extension as to the balance, because it is the duty of the principal to pay, not only part, but all, of the debt, and a part payment would be but a partial performance of his legal duty; but part payment, however small, before maturity,<sup>264</sup> even one day before,<sup>265</sup> is a sufficient consideration for an extension as to the balance, for the creditor has been benefited by the receipt and use of the money sooner than he had a legal right to expect it.

Giving additional security for the debt is a sufficient consideration for its extension.<sup>266</sup> So would be the waiver of a right by the debtor, such as his exemptions,<sup>267</sup> or his defense of bankruptcy.<sup>268</sup>

#### *Definite Time.*

As an agreement for an extension of time must be binding to effect the discharge of a surety, it follows that the extension must be for a definite time. If a definite time be not fixed,<sup>269</sup> the creditor can proceed at once against the prin-

<sup>262</sup> *Hughes v. Southern Warehouse Co.*, 94 Ala. 613, 10 South. 183; *King v. State Bank*, 9 Ark. (4 Eng.) 185, 47 Am. Dec. 739; *Edmonds v. Thomas*, 41 Ill. App. 505; *Davis v. Stout*, 126 Ind. 12, 25 N. E. 862, 22 Am. St. Rep. 565; *Ingels v. Sutliff*, 36 Kan. 444, 13 Pac. 828; *Roberts v. Stewart*, 31 Miss. 664; *Petty v. Douglass*, 76 Mo. 70; *Mathewson v. Strafford Bank*, 45 N. H. 104; *Halliday v. Hart*, 30 N. Y. 474; *Hall v. Bardwell*, 1 C. P. Rep. 23; *Yeary v. Smith*, 45 Tex. 56. Payment of overdue interest would not be a sufficient consideration for an extension of time. See note 254, *supra*.

<sup>263</sup> *Solary v. Stultz*, 22 Fla. 263; *Beasley v. Boothe*, 3 Tex. Civ. App. 98, 22 S. W. 255.

<sup>264</sup> *Vestal v. Knight*, 54 Ark. 97, 15 S. W. 17; *Greely v. Dow*, 2 Metc. (Mass.) 176; *Newsam v. Finch*, 25 Barb. (N. Y.) 175; *Whittle v. Skinner*, 23 Vt. 531.

<sup>265</sup> *Uhler v. Applegate*, 26 Pa. 140.

<sup>266</sup> *Semple v. Atkinson*, 64 Mo. 504; *Gardner v. Watson*, 76 Tex. 25, 13 S. W. 39.

<sup>267</sup> *Semple v. Atkinson*, 64 Mo. 504.

<sup>268</sup> *Post v. Losey*, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677.

<sup>269</sup> *King v. Haynes*, 35 Ark. 463; *Winne v. Colorado Springs Co.*, 3 Colo. 155; *Woolfolk v. Plant*, 46 Ga. 422; *Fleld v. Brokaw*, 148 Ill. 654, 37 N. E. 80; *Waters v. Simpson*, 7 Ill. (2 Gilman) 570;

cipal, or accept payment from the surety, if tendered, without a violation of his agreement.

An agreement by the creditor to wait "a while longer,"<sup>270</sup> or "beyond the day of maturity,"<sup>271</sup> would be too indefinite. An agreement to wait "until the fall" has been held to be definite, as the court takes judicial notice of the seasons, and would construe the expression as meaning until the 1st of September;<sup>272</sup> but an agreement to wait until "some time in summer,"<sup>273</sup> or until "after harvest,"<sup>274</sup> has been considered too indefinite. It matters not for how short a time the extension is given,<sup>275</sup> if it be definite. An extension for one day would suffice to discharge a surety.<sup>276</sup> An extension for "20 or 30 days" is held to be definite, as the creditor could not proceed against the principal for at least 20 days.<sup>277</sup>

*Reservation of Rights Against Surety.*

If, at the time of granting an extension of time to the principal, the creditor expressly reserves his right to proceed

Beach v. Zimmerman, 106 Ind. 495, 7 N. E. 237; Morgan v. Thompson, 60 Iowa, 280, 14 N. W. 306; Berry v. Pullen, 69 Me. 101, 31 Am. Rep. 248; Hayes v. Wells, 34 Md. 512; McGee v. Metcalf, 20 Miss. (12 Smedes & M.) 535, 51 Am. Dec. 122; Aultman v. Smith, 52 Mo. App. 351; Watts v. Gantt, 42 Neb. 869, 61 N. W. 104; Deal v. Cochran, 66 N. C. 269; Miller v. Stem, 2 Pa. 286; Parnell v. Price, 3 Rich. Law (S. C.) 121; Cherry v. Miller, 7 Lea (Tenn.) 305; Alcock v. Hill, 4 Leigh (Va.) 622; Vary v. Norton (C. C.) 6 Fed. 808; 40 Cent. Dig. col. 1906.

<sup>270</sup> Jenkins v. Clarkson, 7 Ohio, 72.

<sup>271</sup> Ward v. Wick, 17 Ohio St. 159.

<sup>272</sup> Abel v. Alexander, 45 Ind. 523, 15 Am. Rep. 270.

<sup>273</sup> Miller v. Stem, 2 Pa. 286.

<sup>274</sup> Findley v. Hill, 8 Or. 247, 34 Am. Rep. 578. In MOULTON v. POSTEN, 52 Wis. 169, 8 N. W. 621, an agreement made in July to give an extension until after threshing was held to be definite, meaning until fall.

<sup>275</sup> Comegys v. Booth, 3 Stew. (Ala.) 14; Menifee v. Clark, 35 Ind. 304; Appleton v. Parker, 81 Mass. (15 Gray) 173; Sprigg v. Bank of Mt. Pleasant, 1 McLean (U. S.) 384, Fed. Cas. No. 13,257, affirmed 39 U. S. (14 Pet.) 201, 10 L. Ed. 419; 40 Cent. Dig. col. 1800.

<sup>276</sup> SMITH v. SHELDEN, 35 Mich. 42, 24 Am. Rep. 529; Johnson v. Planters' Bank, 12 Miss. (4 Smedes & M.) 165, 43 Am. Dec. 480; Fellows v. Prentiss, 3 Denio (N. Y.) 512, 45 Am. Dec. 484; Bangs v. Strong, 7 Hill (N. Y.) 250, 42 Am. Dec. 64; Weed Sewing Mach. Co. v. Oberreich, 38 Wis. 325.

<sup>277</sup> Hamilton v. Prouty, 50 Wis. 592, 7 N. W. 659, 36 Am. Rep. 866.

against the surety, the latter will not be discharged.<sup>278</sup> The effect of such an extension is to make it conditional upon the consent of the surety to remain bound; otherwise, the creditor is not to be considered as bound by his agreement for an extension. The condition upon which he has granted the extension to the principal has not been performed. Such an agreement does not prejudice the surety, as he has the right to withhold his consent, pay the debt at any time, and proceed at once against the principal.

*Surety Not Discharged If Indemnified.*

If a surety has been fully indemnified by his principal, he will not be discharged by an extension.<sup>279</sup> This has been placed upon the ground that he is not injured by the extension; but this seems contrary to the rule that a surety is not to be bound by a contract which he has not made, although he is not injured thereby, or even may be benefited.<sup>280</sup> It has been placed, also, upon the ground that the surety, by receiving indemnity, is placed in the position of a principal,<sup>281</sup> and ceases to possess the rights of a surety; but this seems inconsistent, unless there be an express agreement between the principal and the surety that the latter is to apply the security upon the indebtedness, for an indemnified surety is no more a principal than a secured creditor is regarded as paid. How-

<sup>278</sup> *Prout v. Branch Bank*, 6 Ala. 309; *Dupee v. Blake*, 148 Ill. 453, 35 N. E. 867; *First Bank of Biddeford v. McKenney*, 67 Me. 272; *Clagett v. Salmon*, 5 Gill. & J. (Md.) 314; *Kenworthy v. Sawyer*, 125 Mass. 28; *Tobey v. Ellis*, 114 Mass. 120; *Bailey v. Gould*, Walk. Ch. (Mich.) 478; *Hunt v. Knox*, 34 Miss. 655; *Rucker v. Robinson*, 38 Mo. 154, 90 Am. Dec. 412; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *National Bank of Newburgh v. Bigler*, 83 N. Y. 51; *First Nat. Bank of Charlotte v. Lineberger*, 83 N. C. 454, 35 Am. Rep. 582; *Hagey v. Hill*, 75 Pa. 108, 15 Am. Rep. 583; *Morse v. Huntington*, 40 Vt. 488; *Exchange Bldg. & Inv. Co. v. Bayless*, 91 Va. 134, 21 S. E. 279. *Boston Nat. Bank of Seattle v. Jose*, 10 Wash. 185, 38 Pac. 1026; *Oriental Corp. v. Overend*, 7 H. L. Cas. 348; 40 Cent. Dig. col. 2066.

<sup>279</sup> *Chilton v. Robbins*, 4 Ala. 223, 37 Am. Dec. 741; *Crim v. Fleming*, 101 Ind. 154; *Kleinhaus v. Generous*, 25 Ohio St. 667; *Smith v. Steele*, 25 Vt. 427, 60 Am. Dec. 376; 40 Cent. Dig. col. 1875.

<sup>280</sup> See notes 123 and 212, *supra*.

<sup>281</sup> *Smith v. Steele*, 25 Vt. 427, 60 Am. Dec. 376.

ever, whether the reasons assigned be sufficient or not, the law is as stated.

If the security given to the surety is not sufficient to indemnify him, or proves to be worthless,<sup>282</sup> he will be discharged by an extension; and, if he has been discharged by an extension, his liability will not revive if he afterwards receive indemnity from the principal as a matter of precaution.<sup>283</sup>

*Waiver of Defense.*

After a binding agreement for an extension has been made between the creditor and the principal, such as would entitle a surety to consider himself discharged from liability, he may waive his defense; and if, with full knowledge of all of the facts, he promises to pay the debt, he will be deemed to have made such a waiver,<sup>284</sup> although he may have made the promise in ignorance of the legal effect of the extension;<sup>285</sup> but he would not be bound by a promise made in ignorance of the fact that an extension had been granted.<sup>286</sup>

*Negotiable Instruments.*

A surety, discharged by an extension of time given to the maker of a promissory note, would be liable to a purchaser thereof for value without notice to the extent that he was originally liable; but if the agreement for an extension appeared upon the instrument itself, or was made after maturity, there could not be a valid claim of lack of notice.

<sup>282</sup> Jones v. Ward, 71 Wis. 152, 36 N. W. 711.

<sup>283</sup> Rittenhouse v. Kemp, 37 Ind. 258.

<sup>284</sup> Rockville Nat. Bank v. Holt, 58 Conn. 526, 20 Atl. 669, 18 Am. St. Rep. 293; First Nat. Bank of Monmouth v. Whitman, 66 Ill. 331; Hinds v. Ingham, 81 Ill. 400; Williams v. Boyd, 75 Ind. 286; Sigourney v. Wetherell, 6 Metc. (Mass.) 553; Porter v. Hodenpuy, 9 Mich. 11; Fowler v. Brooks, 13 N. H. 240; Bramble v. Ward, 40 Ohio St. 267; First Nat. Bank of Black River Falls v. Jones, 92 Wis. 36, 65 N. W. 861; Smith v. Winter, 4 Mees. & W. 454. A surety's defense is not waived by receiving security thereafter from the principal. Rittenhouse v. Kemp, 37 Ind. 258; Fowler v. Brooks, 13 N. H. 240.

<sup>285</sup> See post, § 134.

<sup>286</sup> Ellis v. Bibb, 2 Stew. (Ala.) 63; Montgomery v. Hamilton, 43 Ind. 451; Robinson v. Offcut, 23 Ky. (7 T. B. Mon.) 540; Gamage v. Hutchins, 23 Me. 565; Rochester Sav. Bank v. Chick, 64 N. H. 410, 13 Atl. 872; Fay v. Tower, 58 Wis. 236, 15 N. W. 558. See, also,

**TERMINATION OF LIABILITY BY EXPIRATION OF  
TIME.**

- 109. Where a surety has agreed to be liable for a definite time, he cannot be held liable for defaults occurring after that time has expired.**

**ANNUAL OFFICES.**

- 110. If a person becomes surety for an officer elected or appointed annually, he cannot be held liable for any default occurring after the year has expired, unless there be an express term in the contract to that effect.**

Contracts of suretyship may be made to cover a definite time, or they may be made to run indefinitely. Where the parties have made it clear in the contract as to the time during which the surety is to be liable, there is not much difficulty; but, as is frequently the case, if the contract is worded so as to leave this matter in doubt, the strict rules of construction apply, and the surety is favored.<sup>287</sup> If the contract of suretyship relates to some other contract, and the other contract expires at a stated time, the surety would not be liable for defaults occurring after the expiration of the other contract. Thus, where a partnership has been formed for a definite time, a surety for the partners would not be liable for any defaults occurring after such term had expired, although the partnership is continued.<sup>288</sup> Likewise, a guaranty of

*West v. Ashdown*, 1 Bing. 164. If a surety does not avail himself of his defense at the trial, the question cannot be raised on appeal. *Wood v. Tunnicliff*, 74 N. Y. 88.

<sup>287</sup> See ante, § 91 (j).

<sup>288</sup> *Small v. Currie*, 5 De G., M. & G. 141. But it is held that sureties are not discharged because the charter of a corporation is extended, it being the same corporation. *Exeter Bank v. Rogers*, 7 N. H. 21; *PEOPLE v. BACKUS*, 117 N. Y. 196, 22 N. E. 759, *Clark, Corp.* (2d Ed.) p. 73, § 39. Contra, *Thompson v. Young*, 2 Ohio, 335. In *Bank of Washington v. Barrington*, 2 Pa. (2 Pen. & W.) 27, the charter of a bank was forfeited, and afterwards revived. Sureties for the cashier were not liable for any of his defaults occurring after the forfeiture.

the punctual payment of interest upon a bond payable 6 years and 6 months from date, with interest semiannually, applies to the installments falling due before the time of payment of the principal only, and not to interest accruing thereafter.<sup>289</sup> Where a surety signed a note payable 10 days after date, he could not be held liable for money advanced on the note after it became due. He was liable for the amount due at the end of 10 days only.<sup>290</sup> A surety on a lease is not liable for rent after the expiration of the lease,<sup>291</sup> unless the contract shows an intention on his part to remain bound.<sup>292</sup>

The liability of the sureties upon a bond of a tobacco manufacturer, given pursuant to the United States revenue law, would not cease upon the expiration of the manufacturer's license. The provision of the statute making a failure to procure a license punishable was intended to protect the government, and was not designed for the benefit of sureties.<sup>293</sup>

The rule that the surety's liability is terminated by expiration of time is the same, where the time is not fixed by dates, but relates to the accomplishment of a particular work. When the work is accomplished, a surety would be discharged without further action by him. Thus, where a detective was employed to work up a murder case, and his salary and expenses were guaranteed, a settlement of a bill for services at the time of the conviction of the suspect would terminate the liability of the guarantor, although the guaranty was not canceled formally.<sup>294</sup>

#### *Annual Offices.*

There has been considerable litigation in regard to contracts of suretyship for what is designated an "annual office";

<sup>289</sup> *Hamilton v. Van Rensselaer*, 43 N. Y. 244.

<sup>290</sup> *Bank of Saint Albans v. Smith*, 30 Vt. 148.

<sup>291</sup> *Brewer v. Thorp*, 35 Ala. 9; *Kyle v. Proctor*, 7 Bush. (Ky.) 493; *Fasnacht v. Winkelman*, 21 La. Ann. 727; *Brewer v. Knapp*, 18 Mass. (1 Pick.) 332; *Knowles v. Cuddeback*, 19 Hun, 590; *Gadsden v. Quackenbush*, 9 Rich. Law (S. C.) 222.

<sup>292</sup> *Rice v. Loomis*, 139 Mass. 302, 1 N. E. 548; *Decker v. Gaylord*, 8 Hun, 110; *Dufau v. Wright*, 25 Wend. (N. Y.) 636; *Deblois v. Earle*, 7 R. I. 28.

<sup>293</sup> *United States v. Truesdell*, 2 Bond (U. S.) 78, Fed. Cas. No. 16,543.

<sup>294</sup> *Blyth v. Pinkerton*, 57 L. R. A. 468, 10 Wyo. 135, 67 Pac. 619.

that is, where an officer, under the provisions of a statute, charter, or by-law, is to be elected or appointed for a stated period, not necessarily a year, but usually so. The period might be less than a year, or cover more than one year;<sup>295</sup> but the principle is the same, the point being that the term of office is for a fixed term. The rule is that a surety on the bond of such an officer cannot be held liable for any defaults occurring after the expiration of the term for which he was originally elected or appointed,<sup>296</sup> although the officer is re-elected or reappointed,<sup>297</sup> unless the bond expressly shows an intention on the part of the surety to remain liable for subsequent terms. It makes no difference that the bond recites that the surety is to be bound "so long as he continues in office," or "until a successor is appointed." These expressions mean simply that if, during the term for which the officer was originally elected, he should be removed, resign, or die, and a successor should be elected or appointed to serve during the remainder of the unexpired term, the surety would not be liable for any acts occurring after the removal or resignation.<sup>298</sup>

<sup>295</sup> In *Allison v. State*, 8 Heisk. (Tenn.) 312, the term was two years, and the sureties were held liable for that time, although the law required a bond every year.

<sup>296</sup> *State v. Powell*, 40 La. Ann. 241, 4 South. 447; *Norridgewock v. Hale*, 80 Me. 362, 14 Atl. 943; *Chelmsford Co. v. Demarest*, 73 Mass. (7 Gray) 1; *Richardson School Fund v. Dean*, 130 Mass. 242; *Dover v. Twombly*, 42 N. H. 59; *Rahway v. Crowell*, 11 Vroom. (N. J.) 207, 29 Am. Rep. 224; *Peppin v. Cooper*, 2 Barn. & Ald. 431.

<sup>297</sup> *Fresno Enterprise Co. v. Allen*, 67 Cal. 505, 8 Pac. 59; *Welch v. Seymour*, 28 Conn. 387; *Mutual Loan & Bldg. Ass'n v. Miles*, 16 Fla. 204, 26 Am. Rep. 703; *Rany v. Governor*, 4 Blackf. (Ind.) 2; *Ida County Sav. Bank v. Seldensticker*, 102 N. W. 821, 128 Iowa, 54, 111 Am. St. Rep. 189; *Bigelow v. Bridge*, 8 Mass. 275; *Lexington & W. C. R. Co. v. Elwell*, 90 Mass. (8 Allen) 371; *Savings Bank of Hannibal v. Hunt*, 72 Mo. 597, 37 Am. Rep. 449; *Citizens' Loan Ass'n of City of Newark v. Nugent*, 40 N. J. Law, 215, 29 Am. Rep. 230; *Blades v. Dewey*, 136 N. C. 176, 48 S. E. 627, 103 Am. St. Rep. 924; *Harris v. Babbitt*, 4 Dill. (U. S.) 185, Fed. Cas. No. 6,144. If an officer neglects to file his bond, although prepared, and he is reappointed to the same office afterwards, and then files the bond, the sureties are not liable. *Winneshiek County v. Maynard*, 44 Iowa, 15.

<sup>298</sup> *Amicable Mut. Life Ins. Co. v. Sedgwick*, 110 Mass. 163; *Atkins v. Bally*, 9 Yerg. (Tenn.) 111; *United States v. Wright*, 1 McLean (U. S.) 509, Fed. Cas. No. 509.

These expressions may shorten the time for which the surety is to be held liable, but they will not extend it; nor would the surety be liable, even during the first term, if, after a vacancy, the original incumbent resumed the office. If an officer appointed for one year should resign at the end of three months, his successor should serve three months, and the original officer then should be reappointed for the remainder of the year, the sureties upon the bond that he gave at the beginning of the year would not be liable for any of his acts occurring after his resignation, though they would have been liable for the entire year, had his service been continuous.

The rule of construction applied is that the contract is to be construed according to the intention of the parties: and it is to be presumed that a surety contracted with reference to the Constitution,<sup>999</sup> the statute, or corporate by-law creating the office, that he had this fixed term in mind,<sup>1000</sup> and that he intended not to be bound indefinitely.<sup>1001</sup> A person might be willing to assume the risk for one year, but could not intend to become liable for an indefinite number of years by the officer succeeding himself year after year.

*Surety Liable Until Successor Qualifies.*

When it is said that the sureties are liable for a year only, an exact calendar year is not meant, necessarily; but it is construed to be an official year. As the term of office frequently is made to begin upon a certain week day, it would follow that a term might be a little longer than 365 days. Usually an officer holds until his successor qualifies; and, unless there should be unreasonable delay in his successor qualifying, the sureties would be liable for all acts occurring up to the time the successor took charge.<sup>1002</sup>

<sup>999</sup> *State v. Wayman*, 2 Gill & J. (Md.) 254.

<sup>1000</sup> *Wilmington v. Horn*, 2 Har. (Del.) 190. See ante, c. IV, note 38.

<sup>1001</sup> *Kingston Mut. Ins. Co. v. Clark*, 33 Barb. (N. Y.) 196.

<sup>1002</sup> *Montgomery v. Hughes*, 65 Ala. 201; *Board of Adm'rs v. Mc-en*, 48 La. Ann. 251, 19 South. 553, 55 Am. St. Rep. 275; *Chelmsford Co. v. Demarest*, 7 Gray (Mass.) 1; *Thompson v. State*, 37 Miss. 518; *Long v. Seay*, 72 Mo. 648; *Baker City v. Murphy*, 30 Or. 405, 42 Pac. 133, 35 L. R. A. 88. In *Danvers Farmers' Elevator Co. v. Johnson*, 93 Minn. 323, 101 N. W. 492, where an officer held over, his sureties were held liable for a default committed within four months.



*Express Stipulation for Continued Liability.*

A surety may make himself liable for more than the original term, if he clearly indicates his intention to do so. If the language in the bond is to assume liability "during the time he shall continue in said office, whether of the present term for which he has been duly elected, or of any succeeding term to or for which he may be elected," it is broad and comprehensive enough to cover any number of terms;<sup>303</sup> but it is essential, even in such a case, that the terms be continuous.<sup>304</sup> If an officer has been elected for one term, and after a vacancy he is re-elected, the surety could not be held for defaults occurring after the first term.

*Implied Stipulation for Continued Liability.*

A surety may be liable during subsequent terms, if at the time of the execution of the bond a statute is in force making sureties liable for subsequent terms.<sup>305</sup> As the rule of construction is based upon the intention of the parties, it is presumed, unless expressly stated to the contrary, that a surety intends to become liable under the provisions of the statute;\* but the sureties upon the bond of a public officer will not be liable longer than the original term, if it be extended by the Legislature after the bond is given.<sup>306</sup>

after the year expired; and in *Butler v. State*, 20 Ind. 169, where an officer was elected to succeed himself, but neglected to qualify for his second term, the sureties remained liable.

<sup>303</sup> *Coombs v. Harford*, 99 Me. 426, 59 Atl. 529; *People's Building & Loan Ass'n v. Wroth*, 43 N. J. Law (14 Vroom) 70; *Shackamaxon Bank v. Yard*, 143 Pa. 129, 22 Atl. 908, 24 Am. St. Rep. 521; *Augero v. Keen*, 1 Mees. & W. 390.

<sup>304</sup> *Coombs v. Harford*, 99 Me. 426, 59 Atl. 529; *Middlesex Mfg. Co. v. Lawrence*, 83 Mass. (1 Allen) 339.

<sup>305</sup> *Treasurers of State v. Lang*, 2 Balley (S. O.) 430. Under a statute providing that an officer might be continued for another year, with his own consent and the approbation of the executive, his sureties were held liable for two years. *Jacob v. Hill*, 2 Leigh (Va.) 393.

\* See ante, § 91 (j).

<sup>306</sup> *Brown v. Lattimore*, 17 Cal. 93; *Welch v. Seymour*, 28 Conn. 387; *Governor v. Lagow*, 43 Ill. 134; *Mullikin v. State*, 7 Blackf. (Ind.) 77; *Bigelow v. Bridge*, 8 Mass. 275; *Moss v. State*, 10 Mo. 338, 47 Am. Dec. 116; *Dover v. Twombly*, 42 N. H. 59; *Patterson v. Freehold*, 38 N. J. Law, 255; *State v. Mann*, 34 Vt. 371, 80 Am. Dec. 688; *King Co. v. Ferry*, 5 Wash. 536, 19 L. R. A. 500, 34 Am. St.

*Offices not Annual.*

If there be no statute, rule, or by-law naming a fixed period during which an officer shall serve, and the language of the bond is broad enough to cover an indefinite time, a surety will be liable indefinitely,<sup>807</sup> although the formality of an appointment occurs every year. The formal reappointments are not equivalent to filling a vacancy caused by the expiration of a term, but amount to a continuous retention in office;<sup>808</sup> nor does the fact that the officers who made the appointment held their office for a limited time make the term of their appointee expire with the expiration of their own terms,<sup>809</sup> if the appointee is not in the employ of such officers. Where the directors of a bank were elected annually, and they appointed a clerk in the bank, who gave bond, the sureties upon the bond would be liable as long as the clerk continued in the employ of the bank, though a new board of directors should be elected afterwards.<sup>810</sup>

**SURETY LIABLE INDEFINITELY.**

111. Unless a surety has restricted his liability to a definite time, by an express or implied term in his contract to that effect, he remains liable indefinitely.

**SURETY CANNOT TERMINATE HIS LIABILITY BY NOTICE.**

112. A surety who is bound indefinitely, or for a fixed period, cannot terminate his liability by notice, except:
- (a) A surety may terminate his liability by notice if he has reserved that right in his contract.

Rep. 880; *Miller v. Stewart*, 9 Wheat. (U. S.) 680, 6 L. Ed. 189; *Pepin v. Cooper*, 2 Barn. & Ald. 431. Contra, *Commonwealth v. Drewry*, 15 Grat. (Va.) 1.

<sup>807</sup> *Dedham Bank v. Chickering*, 3 Pick. (Mass.) 335; *Daly v. Commonwealth*, 75 Pa. 331; *Birmingham v. Wright*, 16 A. & E. (N. S.) 623. See post, § 111.

<sup>808</sup> *Amherst Bank v. Root*, 2 Metc. (Mass.) 522; *Corporation of Ad-jala v. McElroy*, 5 Ont. 580. See, however, *Wapello Bank v. Colton* (Iowa, 1907) 110 N. W. 450.

<sup>809</sup> *Humboldt Sav. Soc. v. Wennerhold*, 81 Cal. 528, 22 Pac. 920.

<sup>810</sup> *Louisiana State Bank v. Ledoux*, 3 La. Ann. 674.

- (b) A guarantor in a continuing guaranty by notice to the creditor that he will not be liable for future transactions, may limit his liability to advances or sales already made.
- (c) By statute, in some states, a surety, by notice, can instruct the creditor to proceed at once against the principal; and, if the creditor fail to obey such instructions, the surety will be discharged.

#### **SUCCESSIVE BONDS ARE CUMULATIVE.**

113. Where an officer, after having given one bond, gives a second bond covering the same duties, the second one will be cumulative, and the sureties upon the first one will remain liable, unless it is apparent that the second bond is intended to be substituted for the first.

#### **ADDITIONAL BONDS FOR SPECIAL DUTIES.**

114. Where an officer gives a special bond to cover a particular duty, the sureties on his general bond will not be liable for a default in that particular duty, although the language of the general bond is broad enough to cover such particular duty.

#### **LIABILITY WHERE BONDS ARE GIVEN FOR SUCCESSIVE PERIODS.**

115. Where an officer gives bonds for successive periods, with different sureties, the sureties upon the bond in force when the default occurs will be liable. In the absence of proof, the default is presumed to have occurred while the last bond was in force.

#### **LIABILITY OF A SURETY FOR THE FIDELITY OF AN EMPLOYEE IS TERMINATED BY DEFAULT.**

116. Upon the default of an employé becoming known to his employer, a surety on his bond will not be liable for future defaults, unless the surety indicates a willingness to remain liable.

It is always the privilege of a surety, by a stipulation in his contract, to restrict his liability to a fixed time, and, as has been seen in the preceding section, such a restriction may be implied in some cases; but, unless the liability had been restricted by some express or implied term in the contract, a surety becomes bound indefinitely,<sup>811</sup> and, unless the creditor or obligee consent, he cannot secure his release, however much he may desire it. A surety for an officer may see that officer falling into bad habits, and he may become very apprehensive; but he must continue liable until the officer resigns, or is discharged, or is guilty of default. Nor can he procure his discharge because other sureties are dead or insolvent, and the sole liability is falling upon him.<sup>812</sup>

If the surety is bound for a fixed period, he cannot terminate his liability during that period.<sup>813</sup>

*Termination of Liability by Notice.*

In most states, under the common law, a surety cannot terminate his liability by notice, unless he expressly has reserved that right in his contract;<sup>814</sup> and where he has reserved that right, such notice must be clear and explicit,<sup>815</sup> and the right must be exercised in a reasonable manner. A surety on the bond of an employé, having a right to terminate his contract, must give the employer sufficient time to notify the principal, and enable the latter to arrange for a new bond, and the employer cannot be required to discharge the employé instantly.<sup>816</sup>

<sup>811</sup> SAINT v. WHEELER, 95 Ala. 362, 10 South. 539, 36 Am. St. Rep. 210; Humboldt Sav. Soc. v. Wennerhold (Cal. 1889) 20 Pac. 553; Sparks v. Farmers' Bank, 3 Del. Ch. 274; Union Bank of Maryland v. Ridgely, 1 Har. & G. (Md.) 324; Dedham Bank v. Chickering, 3 Pick. (Mass.) 335; Crane v. Newell, 19 Mass. (2 Pick.) 612, 13 Am. Dec. 461; Greenawalt v. Kreider, 3 Pa. (3 Barr.) 264, 45 Am. Dec. 639; Phillips v. Bossard (D. C.) 35 Fed. 99; Calvert v. Gordon, 3 Man. & R. 124; 40 Cent. Dig. col. 1755. A surety on a lease from year to year has the same right to terminate his liability by notice that the lessee has. Desilver's Estate, 9 Phila. 302.

<sup>812</sup> Ridgeway v. Potter, 114 Ill. 457, 3 N. E. 91, 55 Am. St. Rep. 875.

<sup>813</sup> Coe v. Vogdes, 71 Pa. 383.

<sup>814</sup> Pleasonton's Appeal, 75 Pa. 383; Gass v. Stinson, 2 Sumn. (U. S.) 453, Fed. Cas. No. 5,260.

<sup>815</sup> Lanusse v. Barker, 3 Wheat. (U. S.) 101, 4 L. Ed. 343.

<sup>816</sup> La Rose v. Logansport Nat. Bank, 102 Ind. 332, 7 N. E. 805;

*Revocation of Continuing Guaranties.*

A continuing guaranty can be revoked at any time, so that the guarantor will not be liable for any credit extended after receipt of the notice by the creditor,<sup>317</sup> unless the consideration for the guaranty has been executed. Usually the consideration in the case of a continuing guaranty is concurrent with liability on the part of the guarantor, and is executory as to future transactions. As the consideration for a guaranty of sales or loans to be made to the principal is the fact that the creditor has altered his condition for the worse by parting with his goods or with his money, it follows that there is no consideration for a guaranty of the payment of the price of goods, or for the repayment of the loans, until the sales or loans actually are made; and the guarantor at any time can terminate his liability as to future transactions by giving notice.

Continuing guaranties, which may be terminated by express notice, will be revoked, in certain cases, upon the happening of some event,<sup>318</sup> such as the death of the guarantor,<sup>319</sup> or, if the guarantors be partners under a firm name, a dissolution of the partnership.<sup>320</sup>

*Statutory Notice to Proceed Against Principal.*

Although, in most states, at common law a surety cannot require the creditor to proceed against the principal,<sup>321</sup> stat-

Reilly v. Dodge, 131 N. Y. 153, 29 N. E. 1011; Bostwick v. Van Voorhis, 91 N. Y. 353.

<sup>317</sup> Gay v. Ward, 67 Conn. 147, 34 Atl. 1025, 32 L. R. A. 818; Conduitt v. Ryan, 3 Ind. App. 1, 29 N. E. 160; Jeudevine v. Rose, 36 Mich. 54. This is so, whether a time limit has been named or not. Offord v. Davies, 12 J. Scott (N. S.) 748.

<sup>318</sup> A guaranty is not terminated by a change of business by the principal. White's Bank of Buffalo v. Myles, 73 N. Y. 335, 29 Am. Rep. 157.

<sup>319</sup> See post, § 119.

<sup>320</sup> See post, § 120.

<sup>321</sup> Hefferlin v. Krieger, 19 Mont. 125, 47 Pac. 638; White v. Savage (Or. 1906) 87 Pac. 1040; Woffington v. Sparks, 2 Ves. 569; 40 Cent. Dig. col. 2038.

In some states a request by the surety to the creditor to sue the principal will discharge the surety at common law, if the request be not complied with and the principal afterwards becomes insolvent. Thompson v. Robinson, 34 Ark. 44; Martin v. Skehan, 2 Colo. 614;

utes have been enacted in many of them giving a surety such right by written notice,<sup>322</sup> and releasing the surety if the

Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90; PAIN v. PACKARD, 13 Johns. (N. Y.) 174, 7 Am. Dec. 369; Cope v. Smith, 8 Serg. & R. (Pa.) 110, 11 Am. Dec. 582; Hopkins v. Spurlock, 49 Tenn. (2 Helsk.) 152. In some of the states where this rule is followed the notice must be accompanied by a statement that the surety will not continue liable unless there be compliance therewith. Campbell v. Sherman, 151 Pa. 70, 25 Atl. 35, 31 Am. St. Rep. 735; Jackson v. Huey, 10 Lea (Tenn.) 184. The notice must be given after maturity of the debt. Fidler v. Hershey, 90 Pa. 363. And, in some states there must be an offer to indemnify against expenses. Huey v. Pinney, 5 Minn. 310 (Gil. 246); Dillon v. Russell, 5 Neb. 484. If the principal be a nonresident, the surety is not discharged by such common-law notice. Hightower v. Ogletree, 114 Ala. 94, 21 South. 934. Or if the principal be beyond the jurisdiction. Alcorn v. Commonwealth, 66 Pa. 172. Notice to sue may be given to one holding the claim for collection. Pickens v. Yarborough, 26 Ala. 417, 62 Am. Dec. 728; Wetzel v. Sponsler, 18 Pa. (6 Harris) 460. Or to the agent of a nonresident. Thomas v. Mann, 28 Pa. (4 Casey) 520. But notice to an unauthorized agent would not be sufficient. Mutual Ins. Co. v. Davies, 12 Jones & S. (N. Y. Super. Ct.) 172. Nor would notice to a husband or wife of the creditor. Shimer v. Jones, 47 Pa. (4 Wright) 268. The common-law notice does not extend to any other action except suit against the principal. A surety would not be discharged by notice to the creditor to distrain. Brooks v. Carter, 36 Ala. 682; Ruggles v. Holden, 3 Wend. (N. Y.) 216. Nor to collect. Darby v. Berney Nat. Bank, 97 Ala. 643, 11 South. 881; Bates v. State Bank, 7 Ark. (2 Eng.) 394, 46 Am. Dec. 293; Coykendall v. Constable, 48 Hun, 360, 1 N. Y. Supp. 9, affirmed 117 N. Y. 627, 22 N. E. 1128; Weller v. Hoch, 25 Pa. (1 Casey) 525; Parrish v. Gray, 20 Tenn. (1 Humph.) 88. Nor to "push." Singer v. Troutman, 49 Barb. (N. Y.) 182; Wilson v. Glover, 3 Pa. (3 Barr) 404. The common-law notice must be explicit and clear. Goodwin v. Simonson, 74 N. Y. 133; Lawson v. Buckley, 49 Hun, 329, 2 N. Y. Supp. 178; Shimer v. Jones, 47 Pa. (11 Wright) 268. A hint is not sufficient. Greenawalt v. Kreider, 3 Pa. (3 Barr) 264, 45 Am. Dec. 639. Nor is a desire. Savage's Adm'r v. Carleton, 33 Ala. 443. The common-law notice need not be written. Darby v. Berney Nat. Bank, 97 Ala. 643, 11 South. 881. A discharge of one co-surety by notice will not discharge another. Gordon v. Moore, 44 Ark. 349, 51 Am. Rep. 606; KLINGENSMITH v. KLINGENSMITH,

<sup>322</sup> Bartlett v. Cunningham, 85 Ill. 22; Colerick v. McCleas, 9 Ind. 245; Stevens v. Campbell, 6 Iowa (6 Clarke) 538; Nichols v. McDowell, 53 Ky. (14 B. Mon.) 6; Bridges v. Winters, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598; Petty v. Douglass, 76 Mo. 70; 40 Cent. Dig. 2056.

creditor do not comply therewith.<sup>323</sup> Such statutes, being in derogation of common law, are construed strictly. Only those who are sureties in the strict and narrow sense of the word<sup>324</sup> can avail themselves of this statutory right; and it does not extend to indorsers,<sup>325</sup> nor to any sureties who are such by operation of law,<sup>326</sup> nor does the statute apply to unliquidated amounts.<sup>327</sup>

*Sufficiency of Notice.*

The notice must be given after the maturity of the debt,<sup>328</sup> and the evidence that it has been given must be clear.<sup>329</sup> It must be positive, and not ambiguous.<sup>330</sup> The surety must de-

31 Pa. 460. But see, contra, *Towns v. Riddle*, 2 Ala. 194. At common law an indorser cannot terminate his liability by notice. *TRIMBLE v. THORNE*, 16 Johns. (N. Y.) 152, 8 Am. Dec. 302; *Stephens v. Monongahela Bank*, 88 Pa. 157, 32 Am. Rep. 438; *Beebe v. West Branch Bank*, 7 Watts & S. (Pa.) 375. Nor can a guarantor. *Newcomb v. Hale*, 90 N. Y. 326, 43 Am. Rep. 173; *Wells v. Mann*, 45 N. Y. 327, 6 Am. Rep. 93. See the following notes as to the requisites of statutory notice to sue.

<sup>323</sup> *Darby v. Berney Nat. Bank*, 97 Ala. 643, 11 South. 881; *Thompson v. Robinson*, 34 Ark. 44; *Bailey v. New*, 29 Ga. 214; *Fish v. Glover*, 154 Ill. 86, 39 N. E. 1081; *Barnes v. Mowry*, 129 Ind. 568, 28 N. E. 535; *Shenandoah Nat. Bank v. Ayres*, 87 Iowa, 526, 54 N. W. 367; *Medley v. Tandy*, 85 Ky. 566, 4 S. W. 308; *Keirn v. Andrews*, 59 Miss. 39; *Petty v. Douglass*, 76 Mo. 70; *First Nat. Bank of Charlotte v. Homesley*, 99 N. C. 531, 6 S. E. 797; *Clark v. Osborn*, 41 Ohio St. 28; *Bailey Loan Co. v. Seward*, 69 N. W. 58, 9 S. D. 326; *Thompson v. Watson*, 10 Yerg. (Tenn.) 362; *Sullivan v. Dwyer* (Tex. Civ. App. 1897) 42 S. W. 355; *Harrison's Ex'r v. Price*, 25 Grat. (Va.) 553; *Kitttridge v. Stegmier*, 11 Wash. 3, 39 Pac. 242; *Gillilan v. Ludington*, 6 W. Va. 128.

<sup>324</sup> The statute applies to sureties proper, though not shown on the instrument to be such. *Ward v. Stout*, 32 Ill. 399; *Hamrick v. Barnett*, 1 Ind. App. 1, 27 N. E. 106; *Meriden Silver Plate Co. v. Flory*, 44 Ohio St. 430, 7 N. E. 753.

<sup>325</sup> *Boatmen's Sav. Bank v. Johnson*, 24 Mo. App. 316.

<sup>326</sup> *Fish v. Glover*, 154 Ill. 86, 39 N. E. 1081.

<sup>327</sup> *Kauffman v. Commonwealth* (Pa.) 8 Atl. 600.

<sup>328</sup> *Imming v. Fiedler*, 8 Ill. App. 256; *Scales v. Cox*, 106 Ind. 261, 6 N. E. 622. See 40 Cent. Dig. col. 2052.

<sup>329</sup> *Bartlett v. Cunningham*, 85 Ill. 22.

<sup>330</sup> *Kaufman v. Wilson*, 29 Ind. 504; *Moore v. Peterson*, 64 Iowa, 423, 20 N. W. 744; *Lockridge v. Upton*, 24 Mo. 184; *Porter v. First Nat. Bank*, 54 Ohio St. 155, 43 N. E. 165.

mand that the creditor resort to legal proceedings,<sup>331</sup> and not "hope" that he will do so;<sup>332</sup> but it is not requisite that the notice be formal, if it be clear.<sup>333</sup>

*Waiver of Notice.*

The creditor may waive a written notice;<sup>334</sup> and he will be held to have done so if, upon receipt of an oral notice, he promises to sue.<sup>335</sup>

*Withdrawal of Notice.*

The surety may withdraw his notice, in which case his liability continues.<sup>336</sup> A request from the surety, after having served a written notice, that the creditor indulge the principal, will be equivalent to a withdrawal of the notice, if such request be made before the expiration of the time in which the creditor has to bring suit.

*By Whom Notice Must Be Given.*

The statutory notice may be given by an agent of the surety, if authorized,<sup>337</sup> or by the personal representative of a deceased surety.<sup>338</sup> Notice by one surety will not affect the liability of a co-surety.<sup>339</sup>

<sup>331</sup> Notice to collect is not sufficient. *Franklin v. Franklin*, 71 Ind. 573. Nor is notice "to get it settled." *Bowling v. Chambers*, 77 Pac. 16, 20 Colo. App. 113.

<sup>332</sup> A suggestion or recommendation is not sufficient. *Kennedy v. Falde*, 4 Dak. 319, 29 N. W. 667. Nor a desire. *Bethune v. Dozler*, 10 Ga. 235. Nor a wish. *Hill v. Sherman*, 15 Iowa, 365; *Baker v. Kellogg*, 29 Ohio St. 663; *Parrish v. Gray*, 1 Humph. (Tenn.) 83.

<sup>333</sup> *Christy's Adm'r v. Horne*, 24 Mo. 242; *Iliff v. Weymouth*, 40 Ohio St. 101.

<sup>334</sup> *McCarter v. Turner*, 49 Ga. 309; *Hamblin v. McCallister*, 67 Ky. (4 Bush) 418; *Smith v. Clopton*, 48 Miss. 66; *Clark v. Osborn*, 41 Ohio St. 28; 40 Cent. Dig. col. 2058.

<sup>335</sup> *Taylor v. Davis*, 38 Miss. 493.

<sup>336</sup> *Gillilan v. Ludington*, 6 W. Va. 123.

<sup>337</sup> *Medley v. Tandy*, 85 Ky. 566, 4 S. W. 308.

<sup>338</sup> *O'Howell v. Kirk*, 41 Mo. App. 523.

<sup>339</sup> *Wilson v. Tebbetts*, 29 Ark. 579, 21 Am. Rep. 165; *Trustees of Schools v. Southard*, 31 Ill. App. 359; *Martin v. Orr*, 96 Ind. 491; *Ramey v. Purvis*, 38 Miss. 499; *Routon's Adm'r v. Lacy*, 17 Mo. 399; 40 Cent. Dig. col. 2064. Contra, *Jones v. Whitehead*, 4 Ga. 397; *Wright's Adm'r v. Stockton*, 5 Leigh (Va.) 153. And by statute in Kentucky. *Letcher's Adm'r v. Yantis*, 3 Dana (Ky.) 160.



*To Whom Notice Must Be Given.*

The notice must be given to the creditor himself,<sup>340</sup> unless he is not in the neighborhood, and has left the matter in the hands of an agent for collection, in which case notice to the agent will suffice. The marriage relation does not make either spouse the agent for the other for commercial transactions.<sup>341</sup> If there be two creditors, notice must be given to both.<sup>342</sup>

*Noncompliance with Notice.*

Upon receipt of the notice it is the duty of the creditor to use diligence in bringing suit against the principal within the time fixed by the statute,<sup>343</sup> and prosecute it diligently,<sup>344</sup> else the surety will be discharged. If the creditor be ignorant of the residence of the principal, reasonable diligence must be used to ascertain it;<sup>345</sup> and, if the principal be a nonresident, that may excuse suit in some cases.<sup>346</sup>

*Cumulative Bonds.*

After an officer has given bond, and while such bond remains in force, he gives another bond, a question frequently arises whether the new bond supersedes the old one, or whether it

<sup>340</sup> *Cummins v. Garretson*, 15 Ark. 132; *Trustees of Schools v. Southard*, 31 Ill. App. 350; *Driskill v. Washington County*, 53 Ind. 532; *McNelly v. Cooksey*, 70 Tenn. (2 Lea) 39; 40 Cent. Dig. col. 2051. Notice to an agent of the creditor is not sufficient, although the agent told the creditor. *Bartlett v. Cunningham*, 85 Ill. 22. But notice is sufficient, if given to the legal owner of the claim, without being given to the equitable owner. *Gillilan v. Ludington*, 6 W. Va. 128. And notice to one holding the instrument as collateral security will suffice. *McCrary v. King*, 27 Ga. 26.

<sup>341</sup> *Bartlett v. Cunningham*, 85 Ill. 22.

<sup>342</sup> *Kelly v. Matthews*, 5 Ark. (5 Pike) 223.

<sup>343</sup> *Miller v. Gray*, 31 Ill. App. 454; *Root v. Dill*, 38 Ind. 169; *First Nat. Bank of Newton v. Smith*, 25 Iowa, 210; *Cockrill v. Dye*, 33 Mo. 365; *Meriden Silver Plate Co. v. Flory*, 44 Ohio St. 430, 7 N. E. 753.

<sup>344</sup> *Peters v. Linenschmidt*, 58 Mo. 464.

<sup>345</sup> *Cox v. Jeffries*, 73 Mo. App. 412.

<sup>346</sup> *Conklin v. Conklin*, 54 Ind. 289; *Phillips v. Riley*, 27 Mo. 336; *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156. Contra, *Hayward v. Fullerton*, 75 Iowa, 371, 39 N. W. 651. Nonresidence of the principal will not excuse, especially if he had property in the state. *Hancock v. Bryant*, 10 Tenn. (2 Yerg.) 476.

is cumulative. Of course, no difficulty arises when the new bond recites that it is in substitution of the former one. In some states a statutory provision allows a surety to release himself by requiring the principal to give another bond, and a new bond given under such circumstances will release the former surety;<sup>347</sup> but when a new bond has been given, not at the request of a surety, and which is silent as to its effect on the former bond, the second bond is considered to be additional to the former one, although covering the same duties as the old one, and the sureties on the former bond are liable for the defaults of the principal occurring after the execution of the new bond.<sup>348</sup> If a court orders a new bond because the first is not sufficient, the intention is clear that it is cumulative.<sup>349</sup>

#### *Special Bonds.*

Where an officer, who has given a bond covering his duties generally, gives a bond to secure the performance of some special duty, the sureties on the general bond are not liable for defaults in regard to the special duty, although the language of the general bond is comprehensive enough to cover the special duty.<sup>350</sup> Thus, if a county treasurer is required to

<sup>347</sup> *Johnson v. Fuquay*, 1 Dana (Ky.) 514; *Stevens v. Stevens*, 3 Redf. Sur. (N. Y.) 507; *Foster v. Wise*, 46 Ohio St. 20, 16 N. E. 687, 15 Am. St. Rep. 542. If the new bond be defective, the sureties on the first bond are not discharged. *Stevens v. Allmen*, 19 Ohio St. 485.

<sup>348</sup> *Matthews v. Mauldin*, 38 South. 849, 142 Ala. 434; *Dugger v. Wright*, 51 Ark. 232, 11 S. W. 213, 14 Am. St. Rep. 48; *Stewart v. Johnston*, 87 Ga. 97, 13 S. E. 258; *People v. Curry*, 59 Ill. 35; *Allen v. State*, 61 Ind. 268, 28 Am. Rep. 673; *Middleton's Adm'r v. Hensley*, 52 S. W. 974, 21 Ky. Law Rep. 703; *Miller v. Kelsey*, 100 Me. 103, 60 Atl. 717; *State ex rel. Saline County v. Sappington*, 67 Mo. 529; *Gilbert v. Luce*, 11 Barb. (N. Y.) 91; *Pickens v. Miller*, 83 N. C. 543; *State v. Crooks*, 7 Ohio (pt. 2) 221; *Hand Mfg. Co. v. Marks*, 59 Pac. 549, 36 Or. 523; *Finch v. State*, 71 Tex. 52, 9 S. W. 85; *Lingle v. Cook*, 32 Grat. (Va.) 262; *Postmaster General v. Munger*, 2 Paine (U. S.) 189, Fed. Cas. No. 11,309.

<sup>349</sup> *Moulding v. Wilhartz*, 169 Ill. 422, 48 N. E. 189; *Smith v. Whitten*, 117 N. C. 389, 23 S. E. 320.

<sup>350</sup> *Cooper v. People*, 85 Ill. 417; *People v. Moon*, 4 Ill. (3 Scam.) 123; *Bunce v. Bunce*, 65 Iowa, 106, 21 N. W. 205; *Morris v. Cooper*, 35 Kan. 156, 10 Pac. 588; *Williams v. Morton*, 38 Me. 52, 61 Am. Dec. 229; *White v. East Saginaw*, 48 Mich. 567, 6 N. W. 86; *State*

give a special bond for the protection of the school fund, the sureties upon his general bond as county treasurer would not be liable for the school fund, but the liability would devolve upon the sureties in the special bond only;<sup>351</sup> and this would be the result, although the sureties in the general bond had undertaken to become liable for all moneys coming into the treasurer's hands, and would have been liable if a special bond had not been given.

*Bonds Given for Successive Periods.*

Where an officer has given a new bond, which supersedes a former one, and the sureties upon the new bond are not the same as those upon the old one, it is not always an easy matter to determine which set of sureties is liable for the default. There is no difficulty if it be known definitely just when the default occurred, and there has been no effort to conceal it, for the sureties upon the bond in force at the time of the default are the ones liable;<sup>352</sup> but it is not always possible to prove when a default occurred, or the officer may have taken funds received at one time to cover a shortage arising from a previous default. In case of doubt, it will be presumed that the default occurred while the second bond was in force, and the burden is upon the latter set of sureties to prove the contrary.<sup>353</sup>

v. Young, 23 Minn. 551; *State, to Use of Maries County, v. Johnson*, 55 Mo. 80; *Smith v. Gummere*, 39 N. J. Eq. 27; *Henderson v. Coover*, 4 Nev. 429; *State v. Bateman*, 102 N. C. 52, 8 S. E. 882, 11 Am. St. Rep. 708; *State v. Corey*, 16 Ohio St. 17; *Commonwealth v. Toms*, 45 Pa. 408; *Commonwealth v. Pray*, 125 Pa. 542, 17 Atl. 450; *Britton v. Ft. Worth*, 78 Tex. 227, 14 S. W. 585; *Kester v. Hill*, 42 W. Va. 611, 26 S. E. 376; *Board of Supervisors of Milwaukee County v. Pabst*, 70 Wis. 352, 35 N. W. 337; *United States v. Cheeseaman*, 3 Sawy. (U. S.) 424, Fed. Cas. No. 14,790.

<sup>351</sup> *State v. Felton*, 59 Miss. 402; *Broad v. Paris*, 66 Tex. 119, 18 S. W. 342.

<sup>352</sup> *City of Detroit v. Weber*, 29 Mich. 24; *Street v. Laurens*, 5 Rich. Eq. (S. C.) 227; *Sherrell v. Goodrum*, 3 Humph. (Tenn.) 419.

<sup>353</sup> *Phillips v. Brazeal*, 14 Ala. 146; *State v. Stroop*, 22 Ark. 328; *Goodwine v. State*, 81 Ind. 109; *Bockenstedt v. Perkins*, 73 Iowa, 23, 34 N. W. 488, 5 Am. St. Rep. 652; *McKim v. Bartlett*, 129 Mass. 226; *Pine County v. Willard*, 39 Minn. 125, 39 N. W. 71, 1 L. R. A. 118, 12 Am. St. Rep. 622; *Kelly v. State*, 25 Ohio St. 567; *Hetten v.*

Where an officer has been elected for two succeeding terms, with a different bond for each term, and he abstracts money received during the second term to pay a defalcation made under the first term, the sureties on the second bond are liable.<sup>354</sup> In order to make good the defalcation of the first term, the principal might have borrowed money from an outside source, in which case it would have been equivalent to payment with his own funds, leaving an indebtedness on his part to outside parties, and the sureties on the first bond would not be liable. If, instead of borrowing from outside, the principal uses the funds received during the second term, the effect is the same as to the first set of sureties as if he had borrowed it elsewhere; but it is a conversion of the funds received during the second term, and the second set of sureties would be liable for it.<sup>355</sup> It is the same as using the money received during the second term to pay his private debts.<sup>356</sup>

If the principal, at the beginning of his second term report a sum of money in his hands, being that which should have been in his possession at the end of his first term, but in fact he does not have it, the sureties during his second term will be liable,<sup>357</sup> for they have undertaken that the principal will pay over such money.

A test which may be applied in cases where an officer succeeds himself, and has given a different bond for each term, is to determine what would be the liability of the sureties if the officer, instead of succeeding himself, had been succeeded

Lane, 43 Tex. 279; Clark v. Wilkinson, 59 Wis. 543, 18 N. W. 481; Bruce v. United States, 17 How. (U. S.) 437, 15 L. Ed. 129.

<sup>354</sup> Rogers v. State, 99 Ind. 218; State v. Powell, 40 La. Ann. 234, 4 South. 46, 8 Am. St. Rep. 522; Frownfelter v. State, 66 Md. 80, 5 Atl. 410; Board of Supervisors of Lauderdale County v. Alford, 65 Miss. 63, 3 South. 246, 7 Am. St. Rep. 637; State v. Sooy, 39 N. J. Law, 539; Crown v. Commonwealth, 84 Va. 282, 4 S. E. 721, 10 Am. St. Rep. 839.

<sup>355</sup> Ingraham v. Maine Bank, 13 Mass. 208.

<sup>356</sup> Frownfelter v. State, 66 Md. 80, 5 Atl. 410; Colerain, Inhabitants of, v. Bell, 9 Metc. (Mass.) 499; County of Pine v. Willard, 39 Minn. 125, 39 N. W. 71, 1 L. R. A. 118, 12 Am. St. Rep. 622; State v. Sooy, 39 N. J. Law, 539; Gwynne v. Burnell, 7 Clark & F. 572.

<sup>357</sup> Roper v. Sangamon Lodge, 91 Ill. 518, 33 Am. Rep. 60; Morley v. Metamora, 78 Ill. 394, 20 Am. Rep. 266; Goode v. Burford, 14 La. Ann. 102.

by another person. If the successor should take money received by the latter to make good a defalcation of his predecessor, there is no doubt of the liability of the second set of sureties. Likewise, if the successor reports as having on hand a sum of money which he did not receive, but which he should have received from his predecessor, the second set of sureties would be liable likewise.

*Surety's Liability Terminated by Principal's Default.*

In every bond for the faithful performance of duties by another there is an implied term that the employer knowingly will not retain the principal in his employ after any act which constitutes a breach of the bond;<sup>388</sup> and, if he does so, having the power to discharge the defaulting employé,<sup>389</sup> the surety cannot be held for any future defaults,<sup>390</sup> though the surety will remain liable for all defaults which occurred prior to the discovery of one default by the obligee, whether the surety is notified of them promptly or not.<sup>391</sup>

*Knowledge Necessary.*

The rule applies to cases only where the employer has actual knowledge, or what is equivalent thereto; and it is not sufficient that the employer might have discovered the default

<sup>388</sup> *Rapp v. Phoenix Ins. Co.*, 113 Ill. 390, 55 Am. Rep. 427; *Dinsmore v. Tidball*, 34 Ohio St. 411.

<sup>389</sup> *Byrne v. Muzio*, L. R. 8 Ir. 396.

<sup>390</sup> *SAINT v. WHEELER*, 95 Ala. 362, 10 South. 539, 36 Am. St. Rep. 210; *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; *Rapp v. Phoenix Co.*, 113 Ill. 390; *La Rose v. Bank*, 102 Ind. 332, 1 N. E. 805; *Connecticut Mut. Life Ins. Co. v. Scott*, 81 Ky. 540; *ÆTNA INS. CO. v. FOWLER*, 108 Mich. 557, 66 N. W. 470; *Colby Wringer Co. v. Coon*, 74 N. W. 519, 116 Mich. 208; *Atlantic & P. Telegraph Co. v. Barnes*, 39 N. Y. Super. Ct. (7 Jones & S.) 40, affirmed 64 N. Y. 385, 21 Am. Rep. 421; *SANDERSON v. ASTON* (1873) L. R. 8 Exch. 73; *PHILLIPS v. FOXALL* (1872) 7 Q. B. 666. This rule is analogous to the general one that, after a breach, the other party has no right to increase the damages. See *HUNT v. ROBERTS*, 45 N. Y. 691.

<sup>391</sup> *Donnell Mfg. Co. v. Jones*, 49 Ill. App. 327; *Phenix Ins. Co. v. Findley*, 59 Iowa, 591, 13 N. W. 738; *State Bank at Elizabeth v. Chetwood*, 8 N. J. Law (3 Halst.) 1; *Socialistic Co-operative Pub. Ass'n v. Hoffmann*, 33 N. Y. Supp. 695, 12 Misc. Rep. 440; *Wilmington, C. & A. R. Co. v. Ling*, 18 S. C. 116. See ante, § 98.

by an investigation,<sup>332</sup> or that the principal has kept the knowledge from the employer by neglecting to render reports,<sup>333</sup> if the contract of suretyship does not require that any investigation or reports be made. The by-laws of a corporation frequently require a periodical report to be made by certain officers, and that their accounts be audited at stated intervals; but such requirements are for the benefit of the corporation, and are not intended for the benefit of sureties on the bonds of these officers.<sup>334</sup> The sureties undertake that the principal shall be honest, though all around him are rogues.<sup>335</sup> The same rule applies with greater force to public officers, on the ground of public policy. Statutory provisions for auditing public accounts are primarily for the protection of the public,<sup>336</sup> and the failure of one set of officers to perform their duties in this respect will not excuse the failure of another officer to perform his duty. It is his duty to be honest, whether watched or not, and the surety has undertaken that he will be.

<sup>332</sup> Sparks v. Farmers' Bank, 3 Del. Ch. 274; Mutual Loan & Bldg. Ass'n v. Price, 16 Fla. 204, 26 Am. Rep. 703; Fidelity & Casualty Co. v. Gate City Nat. Bank, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. Rep. 440; Planters' Bank of Georgia v. Lamkin, R. M. Charlt. (Ga.) 29; Cawley v. People, 95 Ill. 249; Colby Wringer Co. v. Coon, 74 N. W. 519, 116 Mich. 208; Chew v. Ellingwood, 86 Mo. 260, 56 Am. Rep. 429; Newark v. Stout, 52 N. J. Law, 35, 18 Atl. 943; Board of Supervisors of Monroe County v. Otis, 62 N. Y. 88; Atlas Bank v. Brownell, 9 R. I. 168, 11 Am. Rep. 231; Hart v. United States, 95 U. S. 316, 24 L. Ed. 479; Phillips v. Bossard (D. C.) 35 Fed. 99; Enright v. Falvey, L. R. 4 Ir. 397.

<sup>333</sup> Taylor v. Bank, 2 J. J. Marsh. (Ky.) 564; Inhabitants of Winthrop v. Soule, 175 Mass. 400, 56 N. E. 575; WATERTOWN FIRE INS. CO. v. SIMMONS, 131 Mass. 85, 41 Am. Rep. 196; Atlantic & P. Tel. Co. v. Barnes, 64 N. Y. 385, 21 Am. Rep. 621; Bush v. Critchfield, 4 Ohio, 108; Pittsburg, Ft. W. & C. Ry. Co. v. Shaeffer, 59 Pa. 350.

<sup>334</sup> Mutual Loan & Bldg. Ass'n v. Price, 16 Fla. 204, 26 Am. Rep. 703, 19 Fla. 127; WATERTOWN FIRE INS. CO. v. SIMMONS, 131 Mass. 85, 41 Am. Rep. 196; State, to Use of Southern Bank, v. Ather-ton, 40 Mo. 209; Morris Canal & Banking Co. v. Van Vorst, 21 N. J. Law (1 Zab.) 100.

<sup>335</sup> Pittsburg, Ft. W. & C. R. Co. v. Shaeffer, 59 Pa. 350.

<sup>336</sup> Boone Co. v. Jones, 54 Iowa, 699, 2 N. W. 987, 7 N. W. 155, 37 Am. Rep. 229; Mayor, etc., of Natchitoches v. Redmond, 28 La. Ann.

*Knowledge by Agents.*

Knowledge by one employé of the defaults of another cannot be imputed to the employer, unless it is within the scope of the duties of the employé obtaining knowledge to take action, upon discovering the default, in regard to the defaulting employé.<sup>867</sup> Likewise, knowledge by one public officer of the defaults of another will not terminate the liabilities of the sureties for the defaulting officer.<sup>868</sup>

*What Constitutes a Default.*

The wrongful conduct which the obligee is required to report to the surety must relate to the service in which the principal is engaged,<sup>869</sup> and must amount to a breach of the bond. It must be more than a mere delinquency, such as a failure to remit promptly,<sup>870</sup> or matters which merely give rise to suspicions.<sup>871</sup> As to matters outside the service, the surety must keep himself informed.

If the contract of suretyship expressly provides for giving information of specific acts, such information must be given, although the obligee considers such acts of no importance, else the surety will be discharged. Where a contract of suretyship required notice to be given to the surety if the employer became aware that the employé engaged in gambling or speculation, the surety could not be held for a default of the em-

274; *United States v. Kirpatrick*, 9 Wheat. (U. S.) 720, 6 L. Ed. 199.

<sup>867</sup> *SAINT v. WHEELER*, 95 Ala. 362, 10 South. 539, 36 Am. St. Rep. 210.

<sup>868</sup> *Cawley v. People*, 95 Ill. 249; *Jones v. United States*, 18 Wall. (U. S.) 662, 21 L. Ed. 867.

<sup>869</sup> *La Rose v. Logansport Bank*, 102 Ind. 332, 1 N. E. 805. In this case the bank was notified that the cashier was addicted to gambling, drunkenness, and other vices.

<sup>870</sup> *Pacific F. Ins. Co. v. Pacific Surety Co.*, 93 Cal. 7, 28 Pac. 842; *Home Ins. Co. v. Holway*, 55 Iowa, 571, 8 N. W. 457, 39 Am. Rep. 179; *Gilbert v. State Ins. Co.*, 3 Kan. App. 1, 44 Pac. 442; *WATERTOWN FIRE INSURANCE CO. v. SIMMONS*, 131 Mass. 85, 41 Am. Rep. 196; *ÆTNA INS. CO. v. FOWLER*, 108 Mich. 557, 66 N. W. 470; *Atlantic & P. Tel. Co. v. Barnes*, 64 N. Y. 385, 21 Am. Rep. 621, affirming 39 N. Y. Super. Ct. (7 Jones & S.) 40; *National Life Ins. Co. v. Olhaber*, 9 Ohio Dec. 842, 17 Wkly. Law Bul. 353.

<sup>871</sup> *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977.

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ployé if the employer failed to give such information, although the employer in good faith believed the matter to be of no importance to the surety.<sup>373</sup>

**CHANGES IN NUMBER OF CREDITORS OR OBLIGEEES.**

**117. The liability of sureties is terminated by a change in the number of the creditors or obligees, unless a contrary intention is indicated expressly or impliedly.**

**EFFECT OF DEATH ON IRREVOCABLE CONTRACT OF SURETYSHIP.**

**118. An irrevocable contract of suretyship is not terminated by the death of the principal, or of the surety, but is by the death of the creditor or obligee.**

**REVOCABLE GUARANTY TERMINATED BY NOTICE OF DEATH.**

**119. A revocable guaranty is terminated by the creditor's acquiring knowledge of the guarantor's death.**

**REVOCABLE CONTRACT TERMINATED BY CHANGES IN JOINT LIABILITY OF GUARANTORS.**

**120. Where two or more have become jointly liable on a continuing guaranty, the contract is terminated by any change in the number known to the creditor.**

**REVOCABLE CONTRACT TERMINATED BY CHANGES IN JOINT LIABILITY OF PRINCIPALS.**

**121. A continuing guaranty for two or more principals jointly is terminated by any change in their number.**

*Change in Number of Creditors or Obligees.*

A surety upon a bond given to a firm is not liable for any acts of the principal after the firm is dissolved for any

<sup>373</sup> *Guarantee Co. v. Mechanics' Bank*, 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253, reversing 80 Fed. 766, 26 C. C. A. 146.



cause;<sup>373</sup> and, conversely, a surety on a bond given to one person is not liable to that person jointly with another.<sup>374</sup> A bond given to secure the fidelity of a clerk cannot be enforced by a firm formed by the obligee taking in a partner, although the principal is continued in the same employment;<sup>375</sup> but, if the creditor continues in his individual capacity to deal with the principal, a guarantor will not be freed from liability because the creditor shares the proceeds with another. Thus, where an attorney, who was guarantied payment for professional services to be rendered another, took a partner, but rendered the services personally, the guarantor remained liable;<sup>376</sup> though it would have been otherwise if the services had been rendered by the partners.

#### *Death of Principal.*

In an irrevocable contract of suretyship, the liability of a surety does not cease with the death of the principal.<sup>377</sup> If the deceased principal was the custodian of money, the duty yet remains upon the surety to see that it is accounted for properly and paid over to the person entitled to receive it.<sup>378</sup>

If there were two principals, upon the death of one the surety remains liable for the survivor.<sup>379</sup>

<sup>373</sup> *Bensinger v. Wren*, 100 Pa. 500; *Dance v. Girdler*, 4 Bos. & P. 34.

<sup>374</sup> See post, § 135.

<sup>375</sup> *Barnett v. Smith*, 17 Ill. 565; *Wright v. Russell*, 2 W. Black. 984.

<sup>376</sup> *Roberts v. Griswold*, 35 Vt. 496, 84 Am. Dec. 641.

<sup>377</sup> *Camp v. Watt*, 14 Ala. 616; *State v. Soale*, 36 Ind. App. 73, 74 N. E. 1111; *Parham v. Cobb*, 7 La. Ann. 157; *Baker v. Elliot*, 73 Me. 392; *Bell v. Walker*, 54 Neb. 222, 74 N. W. 617; *Piercy v. Piercy*, 1 Ired. Eq. (N. C.) 214; *Elmendorf v. Whitney*, 153 Pa. 460, 25 Atl. 607; *Boggs v. State*, 46 Tex. 10; *Gaussen v. United States*, 97 U. S. 584, 24 L. Ed. 1009.

<sup>378</sup> *Garrett v. Reese*, 99 Ga. 494, 27 S. E. 750; *Ames v. Dorroh*, 76 Miss. 187, 23 South. 768, 71 Am. St. Rep. 522; *Great Falls v. Hanks*, 21 Mont. 83, 52 Pac. 785; *Parker v. Dominick*, 105 App. Div. 440, 94 N. Y. Supp. 249; *Peabody v. Ohio*, 4 Ohio St. 387.

<sup>379</sup> *Brooks v. Hope*, 139 Mass. 351, 31 N. E. 728; *Dobyns v. McGovern*, 15 Mo. 662.

*Death of Surety.*

Likewise, the death of a surety does not terminate the liability on a bond; but his estate is liable,<sup>330</sup> not only for defaults which have occurred prior to his death, but also for those which occur thereafter.<sup>331</sup> Nor does the death of one jointly liable on a revocable guaranty relieve the other. He should give notice if he does not wish to remain individually liable.<sup>332</sup>

*Death of Obligee.*

The death of the obligee terminates the contract, although the principal is continued in the same capacity by the obligee's executor.<sup>333</sup>

<sup>330</sup> *Hightower v. Moore*, 46 Ala. 387; *Rapp v. Phoenix Ins. Co.*, 113 Ill. 390, 55 Am. Rep. 427; *Powell v. Kettelle*, 1 Gilman (Ill.) 491; *Mowbray v. State*, 88 Ind. 324; *Royal Co. v. Davies*, 40 Iowa, 469, 20 Am. Rep. 581; *Moore v. Carpenter*, 10 Ky. Law Rep. 814; *Green v. Young*, 8 Greenl. (Me.) 14, 22 Am. Dec. 218; *CLARK v. THAYER*, 105 Mass. 216, 7 Am. Rep. 511; *Douglass v. Ferris*, 138 N. Y. 192, 33 N. E. 1041, 84 Am. St. Rep. 435, reversing 63 Hun, 413, 18 N. Y. Supp. 685; *Kernochan v. Murray*, 111 N. Y. 306, 18 N. E. 868, 2 L. R. A. 183, 7 Am. St. Rep. 744; *McNeill v. McBryde*, 112 N. C. 408, 16 S. E. 841; *Burgoyne v. Ohio Life Ins. & Trust Co.*, 5 Ohio St. 586; *Shackamaxon Bank v. Yard*, 150 Pa. 351, 24 Atl. 635, 30 Am. St. Rep. 807, 30 Wkly. Notes Cas. 352; *In re Jones' Estate*, 11 Wkly. Notes Cas. 554, 28 Pittsb. Leg. J. 375; *NATIONAL EAGLE BANK v. HUNT*, 16 R. I. 148, 13 Atl. 115; *Susong v. Valden*, 10 S. C. 247, 30 Am. Rep. 50; *Finch v. State*, 71 Tex. 52, 9 S. W. 85; *Coleman v. Stone*, 85 Va. 386, 7 S. E. 241; *Snyder v. State*, 5 Wyo. 318, 40 Pac. 441, 63 Am. St. Rep. 60; *Broome v. United States*, 15 How. (U. S.) 143, 14 L. Ed. 636; *FEWLASS v. KEESHAN*, 88 Fed. 573, 32 C. C. A. 8; *McClaskey v. Barr* (C. C.) 79 Fed. 408; *United States v. Keiver* (C. C.) 56 Fed. 422; *LLOYD'S v. HARPER* (1880) 16 Ch. Div. 290; *Gordon v. Calvert*, 2 Sim. 253, 4 Russ. 581, 3 M. & Ry. 124. Where the obligation is joint only, and not joint and several, the obligee must proceed against the survivor. *RICHARDSON v. HORTON*, 6 Beav. 185. But in the United States the estate of the deceased surety can be reached in equity. *Smith v. Ballantyne*, 10 Paige (N. Y.) 101.

<sup>331</sup> *Rapp's Estate v. Phoenix Ins. Co.*, 113 Ill. 390, 55 Am. Rep. 427; *Green v. Young*, 8 Greenl. (Me.) 14, 22 Am. Dec. 218; *Palmer v. Pollock*, 26 Minn. 433, 4 N. W. 1113; *CARR v. LADD*, Smith (N. H.) 45; *Hecht v. Weaver* (C. C.) 13 Sawy. 199, 34 Fed. 111.

<sup>332</sup> *Richardson v. Draper*, 23 Hun (N. Y.) 188, affirmed 87 N. Y. 337; *Fennell v. McGuire*, 21 U. C. C. P. 134; *BECKETT v. ADDY-MAN*, 9 Q. B. D. 783.

<sup>333</sup> *Barker v. Parker*, 1 Durn. & E. 287.

*Death of Guarantor.*

A continuing guaranty being revocable so far as future transactions are concerned,<sup>384</sup> upon knowledge<sup>385</sup> of the death of the guarantor being acquired by the creditor, the latter cannot hold the estate of the deceased guarantor liable for any credit extended to the principal after the receipt of such information,<sup>386</sup> unless the guarantor has bound his personal representatives expressly, in which case, in addition to notice of the guarantor's death, the personal representative should give express notice of an intention to revoke the guaranty.<sup>387</sup>

*Changes in Joint Liability of Sureties.*

Where a firm has become liable on a continuing guaranty, notice of the dissolution of the firm, given to the creditor, terminates the liability of the partners for any credit extended to the principal thereafter.<sup>388</sup>

<sup>384</sup> See ante, § 112, b.

<sup>385</sup> There is lack of harmony in the decisions whether death alone will terminate the liability, or whether the creditor must have knowledge of the death. In the following cases the estate of the deceased guarantor was held liable for advances made after the death of the guarantor, the creditor being in ignorance thereof: *Gay v. Ward*, 67 Conn. 147, 84 Atl. 1025, 32 L. R. A. 818; *Rapp's Estate v. Phoenix Co.*, 113 Ill. 390, 55 Am. Rep. 427; *Menard v. Scudder*, 7 La. Ann. 385, 56 Am. Dec. 610; *BRADBURY v. MORGAN*, 1 Hurl. & Colt. 249. But in other jurisdictions it has been held that the guaranty is revoked instantly by the death of the guarantor, although the creditor has no notice thereof. *Aitken v. Lang*, 106 Ky. 652, 51 S. W. 154, 90 Am. St. Rep. 263; *Hyland v. Habich*, 150 Mass. 112, 22 N. E. 765, 6 L. R. A. 383, 15 Am. St. Rep. 174; *Illinois Roofing & Supply Co. v. Gorton*, 19 Pa. Co. Ct. R. 124, 6 Pa. D. C. 407; *Michigan State Bank v. Leavenworth*, 28 Vt. 210. And in such cases it makes no difference that the guaranty was under seal, and contained a provision that it was to continue until notice of revocation, as such provision affected the liability of the guarantor while living only. *JORDAN v. DOBBINS*, 122 Mass. 168, 23 Am. Dec. 305.

<sup>386</sup> *Kernochan v. Murray*, 111 N. Y. 306, 18 N. E. 868, 2 L. R. A. 183, 7 Am. St. Rep. 744; *Slagle v. Amderson*, 1 Monag. (Pa.) 30; *Slagle v. Forney*, 22 Wkly. Notes Cas. (Pa.) 457; *NATIONAL EAGLE BANK v. HUNT*, 16 R. I. 148, 13 Atl. 115; *COULHART v. CLEMENTSON*, 5 Q. B. D. 42.

<sup>387</sup> *Knotts v. Butler*, 10 Rich. Eq. 143; *In re SILVESTER* (1895) 1 Ch. 573.

<sup>388</sup> *City Nat. Bank v. Phelps*, 16 Hun (23 N. Y. Super. Ct.) 153.

*Change in Number of Principals.*

If a person becomes surety for two or more persons, he cannot be held liable for any dealings with one only of them;<sup>399</sup> nor can a surety for one be held liable for any dealings by that principal joined with another,<sup>400</sup> although the surety knew that the principal was to be employed by the two jointly.<sup>401</sup>

These cases arise most commonly in respect to partnerships. A surety cannot be held liable for any dealings with the partners after a change in the membership of the firm causing its dissolution,<sup>402</sup> whether it results from death, retirement of a partner,<sup>403</sup> or from any other cause. Some of the partners may have possessed greater business capacity than the others, and the surety has the right to rely upon them all. The rule applies, although the creditor continues dealing with the firm without knowledge of the change.<sup>404</sup> The neglect of the principal cannot affect the surety's rights.

If the surety has indicated, expressly or impliedly, an intention to remain bound, a change will not affect him. He may be considered as impliedly consenting to remain liable, notwithstanding changes, where the principals are described as a class, or company, and not individually.<sup>405</sup>

If a surety undertakes to become liable for one person, he cannot be held liable for a partnership of which that person

<sup>399</sup> *Prior v. Kiso*, 81 Mo. 241; *State v. Boon*, 44 Mo. 254.

<sup>400</sup> *Dupee v. Blake*, 148 Ill. 453, 35 N. E. 867; *Bell v. Norwood*, 7 La. (4 Curry) 95; *White Sewing Mach. Co. v. Hines*, 61 Mich. 423, 28 N. W. 157; *Montefiore v. Lloyd*, 15 J. Scott (N. S.) 203.

<sup>401</sup> *London Co. v. Bold*, 6 Ad. & El. (N. S.) 514.

<sup>402</sup> *Parham Sewing Mach. Co. v. Brock*, 113 Mass. 194; *Cremer v. Higginson*, 1 Mason (U. S.) 323, Fed. Cas. No. 3,383.

<sup>403</sup> *Hawkins v. New Orleans*, 29 La. Ann. 134; *Bill v. Barker*, 16 Gray (Mass.) 62; *Connecticut Mut. Life Ins. Co. v. Bowler*, 1 Holmes (U. S.) 263, Fed. Cas. No. 3,106; *Holland v. Teed*, 7 Hare, 50.

<sup>404</sup> *Byers v. Grain Co.*, 112 Iowa, 451, 84 N. W. 500. A surety for the payment of gas furnished to one person is not liable for gas furnished to the latter's successor, although there has not been any notice given of the change in the occupancy of the premises. *Manhattan Gaslight Co. v. Ely*, 39 Barb. (N. Y.) 174.

<sup>405</sup> *Gargan v. School Dist.*, 4 Colo. 53; *Barclay v. Lucas*, 1 Term R. 291.

becomes a member,<sup>396</sup> though the mere fact that the principal associates himself with a partner will not terminate the contract, if the creditor continues to deal with the principal as an individual, and not with the firm.<sup>397</sup>

#### **SURETY DISCHARGED BY PERFORMANCE OF CONTRACT.**

**122. A surety will be discharged by performance of his contract.**

#### **PERFORMANCE PREVENTED BY ACT OF CREDITOR OF OBLIGEE.**

**123. A surety will not be liable if nonperformance results from the unlawful act of the creditor or obligee, or from a default of the principal at the request of the creditor or obligee.**

#### **CONTRACT NOT RETROACTIVE.**

**124. A surety cannot be held liable for anything occurring prior to the delivery of his contract, unless the contract so provides.**

#### **COMPLIANCE WITH CONDITIONS.**

**125. If the surety's contract be conditional, the conditions must be complied with before he can be held liable.**

#### **GUARANTIES OF COLLECTION.**

**126. A guarantor of collection will not be liable until the creditor has used due diligence in endeavoring to enforce payment from the principal.**

<sup>396</sup> *Connecticut Mut. Ins. Co. v. Scott*, 81 Ky. 540; *Parham v. Brock*, 113 Mass. 194; *Coan v. Patridge* (Sup.) 98 N. Y. Supp. 570, affirmed 101 N. Y. Supp. 1117; *Dobbins v. Bradley*, 17 Wend. (N. Y.) 422; *Dry v. Davy*, 10 Ad. & El. 30.

<sup>397</sup> *Gilbert v. Insurance Co.*, 8 Kan. App. 1, 44 Pac. 442; *Palmer v. Bagg*, 56 N. Y. 523.

Many rules of law are very simple when stated in the abstract, but very difficult of application. While it is clear that a surety will be discharged when he has performed his contract fully, it is not so easy to decide whether a surety has performed his contract. He will be presumed to have performed it until the contrary be shown.

Sureties for an officer are liable only in event of his failure to perform his duty. If, in the line of his duty, he makes a contract as agent for another, his sureties are not liable for a breach of that contract, as the contract is not the officer's.<sup>398</sup>

A surety cannot be held liable for any act,<sup>399</sup> or for any money,<sup>400</sup> unless he has assumed that liability in his contract.<sup>401</sup> Where a bond was given to turn over a building to the owner "free from liens for labor and material," and the owner pays labor and material claims before the building is turned over to him, there is no breach of the bond,<sup>402</sup> as there might have been if he had not paid the claims. Where a person guaranties that an infant will ratify a sale of land and the notes taken in payment therefor, a ratification by the infant is a performance of the guarantor's contract, whether the notes are paid or not.<sup>403</sup> Where a person has given bond,

<sup>398</sup> *Brown v. Phipps*, 14 Miss. 51; *Commonwealth v. Swope*, 45 Pa. 535, 84 Am. Dec. 518; *Parks v. Ross*, 11 How. (U. S.) 362, 13 L. Ed. 730.

<sup>399</sup> *People v. Tompkins*, 74 Ill. 482; *Denio v. State*, 60 Miss. 949; *People v. Villas*, 86 N. Y. 459, 93 Am. Dec. 520; *Pybus v. Gibb*, 6 El. & Black. 962.

<sup>400</sup> A guaranty read as follows: "This may certify that we being acquainted with Frank Stevens and reposing good confidence in his honesty and the goods you may see fit to entrust him with we will hold ourselves good for provided he should sell them and abscond with money or squander them away and this shall your note against us." Stevens returned the unsold goods, leaving a balance due for goods sold by him. The guarantors were not liable, as he did not abscond. *McDougal v. Calef*, 34 N. H. 534. An agreement to become bound if an employé left does not make the surety liable for a defalcation by the employé. *Freeman v. Waxman*, 43 Misc. Rep. 656, 88 N. Y. Supp. 129.

<sup>401</sup> *Burlington Ins. Co. v. Johnson*, 120 Ill. 622, 12 N. E. 205; *Chamberlain v. Hodgetts* (Tex. Civ. App. 1907) 99 S. W. 161. See ante, § 107, as to effect of alteration of the contract.

<sup>402</sup> *Bell v. Paul*, 35 Neb. 240, 52 N. W. 1110.

<sup>403</sup> *STARR v. MILLIKIN*, 180 Ill. 458, 54 N. E. 328.

with surety, to convey a certain amount of land in a certain district, which he fails to do, the surety cannot be compelled to convey land to the obligee of the bond, although the surety has land of his own that would conform to the description, as the surety's contract is, not that he personally would convey, but that the principal would.<sup>404</sup>

*Principal's Performance of Duties.*

Where the surety's contract is that the principal will discharge the duties of a certain office,<sup>405</sup> the surety has performed his contract if the principal has performed the duties within the scope of the office. Duties may be within the scope of the office, although not strictly within the line of the office, if such duties are casual or temporary at the request of the employer;<sup>406</sup> but a surety will not be liable for acts outside the scope of the office,<sup>407</sup> even though ordered done by a court,<sup>408</sup> or inadvertently omitted from the bond.<sup>409</sup> If a surety has undertaken to be liable for the performance of certain specified duties by the principal, he will not be liable for the performance of duties which are not a full, though a substantial, compliance with the contract. A surety for a contract by the principal to milk 30 cows one year is not liable if the principal, with the consent of the oth-

<sup>404</sup> *Johnson v. Hobson*, 1 Litt. (Ky.) 314.

<sup>405</sup> The sureties on the bond of a postmaster are liable for money embezzled by a clerk, though the postmaster was not negligent, and the clerk held office under the civil service rules of the government. *Bryan v. United States*, 61 U. S. App. 259, 90 Fed. 473, 33 C. C. A. 617, 53 L. R. A. 218. But sureties are not liable, generally, for defaults of subordinates employed by the obligee. *Chicago & A. R. R. Co. v. Higgins*, 58 Ill. 128; *Equitable Life Co. v. Coats*, 44 Mich. 260, 6 N. W. 648.

<sup>406</sup> *Detroit Bank v. Ziegler*, 49 Mich. 157, 13 N. W. 496, 43 Am. Rep. 456; *Rochester Bank v. Elwood*, 21 N. Y. 88; *German Bank v. Auth*, 87 Pa. 419, 30 Am. Rep. 374.

<sup>407</sup> *McKee v. Griffin*, 66 Ala. 211; *Carey v. State*, 34 Ind. 105; *Baltimore & O. R. Co. v. State*, 60 Md. 449; *Ottenstein v. Alpaugh*, 9 Neb. 237, 2 N. W. 219; *Gregg v. Currier*, 36 N. H. 200; *State v. Sloane*, 20 Ohio, 327; *Carter v. Young*, 9 Lea (Tenn.) 210.

<sup>408</sup> *Nelson v. Woodbury*, 1 Me. 251.

<sup>409</sup> *United States v. Cheeseman*, 3 Sawy. (U. S.) 424, Fed. Cas. No. 14,790.

er party to the contract, milks 28 cows part of the year, and 32 for a part.<sup>410</sup>

*Performance as to Locality.*

If the contract of suretyship is in regard to some act to be performed in a certain locality, the surety cannot be held liable for acts outside of that locality.<sup>411</sup> A surety upon the bond of an agent to indemnify the obligee against loss while the principal was acting in a certain territory cannot be held liable for defaults in a new territory assigned to the agent.<sup>412</sup> A guaranty of payment for a bridge to be built in a certain place cannot be enforced if the bridge be built in an another place;<sup>413</sup> and a guarantor for the delivery to a lessor of a flock of sheep from a certain farm at a certain time is not liable for a nondelivery of sheep from a farm made smaller by the lessor.<sup>414</sup>

*Performance as to Time.*

If the contract of suretyship is in regard to some act to be performed at a certain time, the surety cannot be held liable for acts performed at a different time. Where a bond provides that an accused person shall appear at a certain time, and he does so appear, the surety is discharged, although the Legislature has changed the time.<sup>415</sup> If, however, the day is not specified, but the surety undertakes that the defendant shall appear at the next term of court, the surety is not discharged unless the defendant does appear at the next term of court, although the time has been changed by the Legislature, and is not the same as that in the mind of the surety at the execution of the contract.<sup>416</sup>

<sup>410</sup> WHITCHER v. HALL, 5 Barn. & C. 269, 8 Dowl. & R. 22, 4 L. J. K. B. 167, 29 Rev. Rep. 244.

<sup>411</sup> United States v. Boecker, 21 Wall. (U. S.) 652, 22 L. Ed. 472. A guarantor of the payment of paper to be made payable at a particular bank will not be liable on a note which specifies no place of payment, though the note actually be deposited for collection in the bank designated and the guarantor is notified. Dobbin v. Bradley, 17 Wend. (N. Y.) 422.

<sup>412</sup> White Sewing Machine Co. v. Mullins, 41 Mich. 339, 2 N. W. 196.

<sup>413</sup> Mercer County v. Covert, 6 Watts & S. (Pa.) 70.

<sup>414</sup> HOLME v. BRUNSKILL (1877) L. R. 3 Q. B. D. 495.

<sup>415</sup> State v. Stephens, 2 Swan (Tenn.) 308.

<sup>416</sup> Walker v. State, 6 Ala. 350.



*Performance as to Amounts.*

Sureties cannot be held liable for any money received by their principal which he does not receive in the line of his duty,<sup>417</sup> or which is collected by him without authority.<sup>418</sup> The sureties on the bond of a public officer are not liable for voluntary contributions received by him for a specific purpose, although he has included the receipts and disbursements of such money in his official accounts;<sup>419</sup> but the sureties would be liable, however, if the funds in the custody of the principal are increased, provided such funds are of the same general character.<sup>420</sup>

Sureties are liable for all money in the hands of the prin-

<sup>417</sup> *Satterfield v. People*, 104 Ill. 448; *Scott v. State*, 46 Ind. 203; *Sample v. Davis*, 4 G. Greene (Iowa) 117; *Saltenberry v. Loucks*, 8 La. Ann. 95; *Nolley v. Callaway County Court*, 11 Mo. 447; *Henderson v. Coover*, 4 Nev. 429; *People v. Pennock*, 60 N. Y. 421; *Commonwealth v. Bonding Co.*, 25 Pa. Super. Ct. 145; *Turner v. Collier*, 4 Heisk. (Tenn.) 89; *Heidenhelmer v. Brent*, 59 Tex. 533; *Dr. Koch Vegetable Tea Co. v. Gates* (Wash. 1906) 86 Pac. 624; *United States v. Cranston*, 3 Cranch, C. C. (U. S.) 289, Fed. Cas. No. 14,889; *Keith v. Fenelon Falls Union School*, 3 Ont. 194. Where the Legislature made the State Treasurer cashier of a state bank, his sureties as Treasurer were not liable for the funds of the bank. *Reynolds v. Hall*, 2 Ill. 33. Nor are the sureties for an agent liable for notes given by him as an individual. *Phillips v. Singer Mfg. Co.*, 88 Ill. 305. A bond to account for money coming into the hands of an agent does not cover advances made by the obligee to him. *Burlington Ins. Co. v. Johnston*, 24 Ill. App. 565, affirmed 120 Ill. 622, 12 N. E. 205.

<sup>418</sup> *Forward v. Marsh*, 18 Ala. 645; *San Jose v. Welch*, 65 Cal. 358, 4 Pac. 207; *People v. Huffman*, 182 Ill. 390, 55 N. E. 981, 78 Ill. App. 345; *Linch v. Litchfield*, 16 Ill. App. (16 Bradw.) 612; *State v. Barrett*, 121 Ind. 92, 22 N. E. 969; *Commonwealth v. Sommers*, 3 Bush (Ky.) 555; *Saltenberry v. Loucks*, 8 La. Ann. 95; *Robinson v. Millard*, 133 Mass. 236; *Chapin v. Livermore*, 13 Gray (Mass.) 561; *State v. Bonner*, 72 Mo. 387; *Supervisors of Rensselaer v. Bates*, 17 N. Y. 242; *Douglass v. Mayor*, 56 How. Prac. (N. Y.) 178; *State v. Long*, 30 N. C. 415; *Commonwealth v. Pray*, 125 Pa. 542, 17 Atl. 450; *Reed v. Commonwealth*, 11 Serg. & R. (Pa.) 441; *Ballard v. Brummitt*, 4 Strob. Eq. 171; *Shelton v. Smith*, 62 Tenn. 82; *Thomas v. Browder*, 33 Tex. 783; *Hutcherson v. Pigg*, 8 Grat. (Va.) 220; *People v. Hilton* (C. C.) 36 Fed. 172; *Leigh v. Taylor*, 7 Barn. & C. 491.

<sup>419</sup> *Hatch v. Attleborough*, 97 Mass. 533.

<sup>420</sup> *PEOPLE v. BACKUS*, 117 N. Y. 196, 22 N. E. 759.

cipal at the beginning of his term,<sup>421</sup> and for all funds on hand at the end of the term, although converted afterwards, if it was their duty to account for all money coming into his hands during the term.<sup>422</sup>

Where an officer, whose duties primarily have nothing to do with the custody of money, afterwards is made a collector of certain fees, his sureties are not liable for his failure to deliver them.<sup>423</sup>

If a surety has indemnified the obligee against the payment of money, the surety becomes liable to suit if the obligee has been called upon to pay and has given his own negotiable note, which is accepted as payment;<sup>424</sup> and the sureties upon the bond of an assignee for the benefit of creditors are liable for money which the assignee is directed by the court to pay.<sup>425</sup>

#### *Breach of Guaranties.*

A guaranty of payment is broken upon the failure of the principal to pay.<sup>426</sup> A guarantor cannot be held for any greater amount than he has undertaken to be liable for; but he is liable for stipulated damages, such as a promise to pay 20 per cent. interest if the debt be not paid at maturity.<sup>427</sup> Where a person agrees to guaranty payment if money be advanced to a named person, the guarantor will not be liable if the guaranty has been applied upon a prior indebtedness of the principal and to a purchase of goods, as this is a departure from its terms.<sup>428</sup>

A guaranty to be responsible for "chamber suits" does not apply to isolated articles of furniture merely because they were

<sup>421</sup> *Roper v. Trustees of Sangamon Lodge*, 91 Ill. 518, 33 Am. Rep. 60; *McMullen v. Winfield Bldg. Ass'n*, 64 Kan. 298, 67 Pac. 892, 56 L. R. A. 924, 91 Am. St. Rep. 236; *Broome v. United States*, 15 How. (U. S.) 143, 14 L. Ed. 636.

<sup>422</sup> *Black v. Oblender*, 135 Pa. 526, 19 Atl. 945.

<sup>423</sup> *People v. Tompkins*, 74 Ill. 482.

<sup>424</sup> *Gage v. Lewis*, 68 Ill. 604; *Lee v. Clark*, 1 Hill (N. Y.) 56.

<sup>425</sup> *Little v. Commonwealth*, 48 Pa. 337.

<sup>426</sup> A delay in delivering goods does not discharge a guarantor. *American Radiator Co. v. Hoffman*, 26 Pa. Super. Ct. 177.

<sup>427</sup> *Gridley v. Capen*, 72 Ill. 11.

<sup>428</sup> *GANO v. FARMERS' BANK*, 103 Ky. 508, 45 S. W. 519, 82 Am. St. Rep. 596; *Wright v. Johnson*, 8 Wend. (N. Y.) 512.

capable of being made up into suits;<sup>429</sup> and a guaranty of the payment of rent "so long as M. shall occupy said premises" does not make the guarantor liable after the tenant leaves, though long before the lease expires.<sup>430</sup>

A guaranty of a note after maturity means that it will be paid within a reasonable time;<sup>431</sup> and a guaranty that a note will be "good and collectible two years" means any time within two years after it is due.<sup>432</sup>

*Part Performance of Severable Contracts.*

If a contract of suretyship be severable, a surety may be liable for part, although all of the terms of the guaranty are not complied with by the creditor.<sup>433</sup> A guarantor of a lease is liable for each monthly installment of rent as it becomes due.<sup>434</sup>

*Performance in the Alternative.*

If a surety undertakes that the principal shall perform one of two or more acts in the alternative, a performance of any one of the acts will discharge the surety. Thus, where the undertaking was that an importer of goods would pay a certain sum, or the amount of duties to be due, or would export the goods, the payment of the sum specified discharged the sureties, although such sum was less than the amount of duties subsequently due.<sup>435</sup>

*Liability of Surety for Principal's Errors of Judgment.*

The sureties upon the bond of an officer may be liable for losses arising from his lack of judgment, as well as for those arising from his dishonesty.<sup>436</sup>

*Indemnity Against Liability Before Damage.*

While, as a general rule, sureties are not liable to the creditor or obligee until he has suffered an actual loss, the contract may be worded so as to make the surety liable before

<sup>429</sup> *Hayden v. Crane*, 1 Lans. (N. Y.) 181.

<sup>430</sup> *Morrow v. Brady*, 12 R. I. 130.

<sup>431</sup> *Yeates v. Walker*, 62 Ky. (1 Duv.) 84.

<sup>432</sup> *Marsh v. Day*, 35 Mass. (18 Pick.) 321.

<sup>433</sup> *Nash v. Hartland*, 2 Ir. L. Rep. 190.

<sup>434</sup> *Binz v. Tyler*, 79 Ill. 248; *Kingsbury v. Westfall*, 61 N. Y. 356.

<sup>435</sup> *Dumont v. United States*, 98 U. S. 142, 25 L. Ed. 65.

<sup>436</sup> *Witkowski v. Hern*, 82 Cal. 604, 23 Pac. 132; *Dodd v. State*, 18

the creditor or obligee has been compelled to pay anything. If the surety has undertaken to hold the obligee harmless, the obligee may be harmed in other ways than by the payment of money. There is a distinction between indemnity against liability and indemnity against loss by reason of liability. In the first case, the surety undertakes to save the obligee from a specific thing; in the other, from its consequences. In the first case, the surety is liable when the event occurs;<sup>437</sup> in the latter, the surety is not liable until the actual damage has been sustained by the obligee.<sup>438</sup> If a surety undertakes that the obligee shall not become "liable or subject" to loss, there is a breach as soon as the latter has become liable to be called upon to pay and subject to a suit, and the obligee is not obliged first to pay before resorting to the sureties.<sup>439</sup>

*Performance Prevented by Creditor or Obligee.*

It is obvious that a surety should not be held liable for nonperformance of his contract, if it has resulted from a request by the obligee or creditor to the principal not to perform,<sup>440</sup> or performance has been prevented by some wrongful act<sup>441</sup> or omission<sup>442</sup> of the obligee or creditor. Where

Ind. 56; *Rosenthal v. Davenport*, 38 Minn. 543, 38 N. W. 618; *Barrington v. Bank of Washington*, 14 Serg. & R. (Pa.) 405.

<sup>437</sup> *Bancroft v. Winspear*, 44 Barb. (N. Y.) 209; *Churchill v. Hunt*, 8 Denio (N. Y.) 321; *Baby v. Baby*, 8 Up. Can., Q. B. 76.

<sup>438</sup> *Gilbert v. Wiman*, 1 N. Y. 550, 49 Am. Dec. 359; *Johnson v. Gilbert*, 9 Hun (N. Y.) 469.

<sup>439</sup> *BRINSON v. THOMAS*, 2 Jones Eq. (N. C.) 414. See, also, *Riddle v. Baker*, 13 Cal. 295; *Conner v. Reeves*, 103 N. Y. 527, 5 N. E. 439; *Smith v. Chicago & N. W. R. Co.*, 18 Wis. 17; *Patton v. Caldwell*, 1 Dall. (Pa.) 419, 1 L. Ed. 204. The word "molestation" is not so comprehensive as "damage," being but a species of damage. *Gilbert v. Wiman*, 1 N. Y. 550, 49 Am. Dec. 359.

<sup>440</sup> *Brazler v. Clark*, 5 Pick. (Mass.) 96; *Homes v. O'Conner*, 9 Tex. Civ. App. 454, 29 S. W. 236. In *SMITH v. MOLLESON*, 148 N. Y. 241, 42 N. E. 669, a building contract could be terminated by the owner giving notice and taking possession. He gave notice, but did not take possession; the notice being recalled. *Held*, that the sureties remained liable for the default of the contractor.

<sup>441</sup> Where a judgment is recovered against a building contractor and the owner of the property for damages to adjoining property, which the owner pays, he cannot recover from sureties on the con-

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<sup>442</sup> See note 442 on following page.

the distributee of the estate of a deceased person, by a secret agreement with the administrator, allows the latter to use the funds of the estate in his private business, the sureties upon the administrator's bond are not liable.<sup>443</sup> It would be equivalent to payment to the distributee and a loan by him to the administrator.<sup>444</sup> So, if the creditor intrusts the note of the principal and sureties to the principal for some fraudulent purpose, and consents that he shall make the sureties believe the debt is paid, thus inducing them to forego any advantage they would otherwise have, the sureties will be discharged; though it would be otherwise if the note was intrusted to the principal for an honest purpose, and the creditor had no knowledge of the false statement of the principal.<sup>445</sup> Where the creditor obtains a judgment against the principal for less than the amount due, and refuses to ask for a new trial at the request of a guarantor of the debt, intending to hold the guarantor for the difference, the guarantor is discharged.<sup>446</sup> If the sureties of a person out on bail request the state to aid in the arrest of the principal, they will be discharged if

tractor's bond given to indemnify the owner against damage caused to the adjoining landowner, as the contractor and the obligee in the bond were joint tort-feasors. *Leppert v. Flagg*, 101 Md. 71, 60 Atl. 450. If the obligee in an appeal bond secures the dismissal of the appeal on the ground that the appellant has failed to comply with some requirement, the sureties on the bond are not liable because the appeal was not prosecuted. *Columbia R. R. Co. v. Brailard*, 12 Wash. 22, 40 Pac. 382. See post, § 172 (g), as to right to contribution being lost by the wrongful act of the co-surety.

<sup>442</sup> Where a person for whom some fittings of a warehouse were to be provided agreed to insure the fittings, but neglected to do so, and they were destroyed by fire, a guarantor of the performance of the contract was discharged entirely, and not to the extent of the value of the fittings destroyed; and it was immaterial whether he knew of the stipulation as to insurance or not. *WATTS v. SHUTTLE-WORTH*, 5 Hurl. & N. 235, 7 Hurl. & N. 355.

<sup>443</sup> *Rutter v. Hall*, 31 Ill. App. 647.

<sup>444</sup> *Wells v. Gant*, 4 Yerg. (Tenn.) 491. And see *Pickering v. Day*, 3 Houst. (Del.) 474, 95 Am. Dec. 291. If the judgment creditor allows the constable to use the money collected on an execution, the sureties of the constable are not liable therefor. *Ferguson v. Hirsch*, 54 Ind. 337.

<sup>445</sup> *Wilson's Adm'r v. Green*, 25 Vt. 450, 60 Am. Dec. 279.

<sup>446</sup> *Stark v. Fuller*, 42 Pa. 320.

such aid be refused.<sup>447</sup> A surety will not be liable for the failure of a tenant to make improvements, if the landlord has ejected the tenant from the premises, rendering it impossible for the tenant to comply with his agreement, although such ejection was lawful.<sup>448</sup> Sureties who are bound to the state for the appearance of an accused person at a certain time are not liable for failure to produce him, if the state has allowed him to be extradited.<sup>449</sup>

*Performance Not Excused by Lawful Act of Creditor.*

Sureties are not excused by any lawful act of the creditor or obligee, if such act would not result necessarily in impossibility of performance, although the failure of the principal to carry out his contract has been the result of such act. Where a newspaper plant was sold, and the purchaser gave notes with surety for the purchase price, the fact that the former proprietor started another paper in the same place, which drew so much patronage from the former paper that its purchaser was unable to pay his notes, would not discharge the surety on the notes; the creditor having made no agreement not to start another paper.<sup>450</sup>

*When Liability for Performance Begins.*

The general rule is that a surety is not liable for any defaults occurring before the delivery of the contract,<sup>451</sup> unless he expressly or impliedly has indicated an intention to be so liable.<sup>452</sup> If indefinite expressions in the contract might be construed to refer either to past or to future transactions, they

<sup>447</sup> *Commonwealth v. Overby*, 80 Ky. 208, 44 Am. Rep. 471.

<sup>448</sup> *Trustees v. Miller*, 3 Ohio (3 Ham.) 261.

<sup>449</sup> *Reese v. United States*, 9 Wall. (U. S.) 13, 19 L. Ed. 541.

<sup>450</sup> *Rupp v. Over*, 3 Brewst. (Pa.) 133. And see *Thornton v. Thornton*, 63 N. C. 211.

<sup>451</sup> *Mutual Loan Ass'n v. Price*, 19 Fla. 127; *Lowry v. State*, 64 Ind. 421; *Gum v. Swearingen*, 69 Mo. 553; *Thomson v. MacGregor*, 81 N. Y. 592, reversing 45 N. Y. Super. Ct. (13 Jones & S.) 197; *Cole v. Crawford*, 69 Tex. 124, 5 S. W. 646; *United States v. Spencer*, 2 McLean, 405, Fed. Cas. No. 16,368; *Peters v. Merchants' Bank*, 149 Fed. 373, 79 C. C. A. 193; 40 Cent. Dig. col. 1779.

<sup>452</sup> *Dugger v. Wright*, 51 Ark. 232, 11 S. W. 213, 14 Am. St. Rep. 48; *Powell v. Patison*, 100 Cal. 234, 34 Pac. 676; *Mahaffey v. Gray*, 85 Ga. 460, 11 S. E. 774; *Morley v. Metamora*, 78 Ill. 394, 20 Am. Rep.

will be presumed to refer to future transactions only;<sup>453</sup> nor will a bond be construed to be retrospective merely because it has been given in substitution of a former bond, which was canceled.<sup>454</sup> Where the bond of an officer is delivered after the beginning of the term, and after he has entered upon the performance of his duties, it may be construed to cover acts prior to delivery.<sup>455</sup> So a bond<sup>456</sup> or a guaranty<sup>457</sup> which bears a date prior to its delivery might indicate an intention that it was to take effect from its date.

If a guaranty is broad enough in its terms to be retroactive, it is no defense to the guarantor that he did not know of the existence of any prior indebtedness, although his ignorance was the result of false representations by the principal; the creditor not participating therein.<sup>458</sup>

Sureties may be made liable indirectly for prior delinquencies, as where the principal misapplies money received after the delivery of the bond to pay prior delinquencies, although a prior bond was in force at the time of the original default.<sup>459</sup>

266; *Pinkstaff v. State*, 59 Ill. 148; *State v. Barrett*, 121 Ind. 92, 22 N. E. 969; *Brown v. State*, 23 Kan. 235; *Abshire v. Rowe*, 112 Ky. 545, 66 S. W. 394, 56 L. R. A. 936, 99 Am. St. Rep. 302; *Choate v. Arrington*, 116 Mass. 552; *State v. Berning*, 74 Mo. 87; *Scofield v. Churchill*, 72 N. Y. 565; *Foster v. Wise*, 46 Ohio St. 20, 16 N. E. 687, 15 Am. St. Rep. 542; *State v. Moses*, 18 S. C. 366; *Miller v. Moore*, 3 Humph. (Tenn.) 189; *Rudolf v. Malone*, 104 Wis. 470, 80 N. W. 743. A guarantor will be liable for past acts, where that appears to be his intention. *Harwood v. Johnson*, 20 Ill. 367; *People v. Lee*, 104 N. Y. 441, 10 N. E. 884; *Pritchett v. Wilson*, 39 Pa. 421.

<sup>453</sup> *Weir Plow Co. v. Walmsley*, 110 Ind. 242, 11 N. E. 232; *Morrell v. Cowan*, L. R. 7 Ch. D. 151.

<sup>454</sup> *Thompson v. Dickerson*, 22 Iowa, 360.

<sup>455</sup> *McMullen v. Winfield Bldg. Ass'n*, 64 Kan. 298, 67 Pac. 892, 56 L. R. A. 924, 91 Am. St. Rep. 236; *Hatch v. Inhabitants of Attleborough*, 97 Mass. 533.

<sup>456</sup> *Aetna L. Ins. Co. v. American Surety Co. (C. C.)* 34 Fed. 291. Where additional sureties signed the original bond of an officer, they were held liable as though they had signed when the bond was executed originally. *Bryant v. Owen*, 1 Ga. (1 Kelly) 355; *Commonwealth v. Adams*, 3 Bush (Ky.) 41.

<sup>457</sup> *Abrams v. Pomeroy*, 13 Ill. 133.

<sup>458</sup> *Harwood v. Klersted*, 20 Ill. 367; *People v. Lee*, 104 N. Y. 442, 10 N. E. 884.

<sup>459</sup> See note 354, *supra*.

So, if a guaranty provides for the payment of all notes discounted by the creditor, it will cover a note discounted thereafter, although it was given to cancel a note given before the guaranty.<sup>400</sup>

While sureties might not be liable for an embezzlement by the principal which occurred before the bond was delivered, they would be liable nominally for a falsification of his accounts, made by him after the delivery of the bond, to conceal such misapplication of the money.<sup>401</sup>

*Compliance with Conditions.*

If a surety's contract be subject to conditions or contingencies, express or implied, he will not be liable if there has not been a compliance with them by the party seeking to hold him,<sup>402</sup> unless they have been waived,<sup>403</sup> although he may have suffered no injury by failure to comply with them,<sup>404</sup> or even

<sup>400</sup> Peoria Sav. Co. v. Elder, 165 Ill. 55, 45 N. E. 1083.

<sup>401</sup> State v. Atherton, 40 Mo. 209.

<sup>402</sup> Cereghino v. Hammer, 60 Cal. 235; Jones v. Keer, 30 Ga. 93; STARR v. MILLIKIN, 180 Ill. 458, 54 N. E. 328; Field v. Rawlings, 6 Ill. 581; Orleans & J. Ry. Co. v. International Const. Co. (1903) 113 La. 409, 37 South. 10; Linn County v. Farris, 52 Mo. 75, 14 Am. Rep. 389; Folsom v. Squire (1905) 72 N. J. Law, 430, 60 Atl. 1102; Bigelow v. Benton, 14 Barb. (N. Y.) 123; Hayden v. Crane, 1 Lans. (N. Y.) 181; Whitsell v. Mebaue, 64 N. C. 345; Clay v. Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422; Caldwell v. Heltshu, 9 Watts & S. (Pa.) 51; Dallas Homestead Ass'n v. Thomas, 36 Tex. Civ. App. 268, 81 S. W. 1041; Novelty Mill Co. v. Heinzerling, 39 Wash. 244, 81 Pac. 742; Swift v. Jones (C. C.) 135 Fed. 437. Where contract provides for notice of act of contractor, formal notice need not be given, if the surety have knowledge and is acting on it. Henry v. Ætna Indemnity Co., 36 Wash. 553, 79 Pac. 42.

<sup>403</sup> Goodwin v. Buckman, 11 Iowa, 308; Ege v. Barnitz, 8 Pa. 304; Day v. Elmore, 4 Wis. 190. Where the owner of a building in course of construction was to pay on architect's certificates only, and the surety places his O. K. on subsequent payments with knowledge that the first was paid without such certificate, the surety will be deemed to have waived the condition. Getchell & Martin Lumber & Mfg. Co. v. National Surety Co. (1904) 124 Iowa, 617, 100 N. W. 556, 1123.

<sup>404</sup> Craig v. Parkis, 40 N. Y. 181, 100 Am. Dec. 469; Burt v. Horner, 5 Barb. (N. Y.) 501; French v. Marsh, 29 Wis. 649. A failure of the owner of a building to insure it will discharge a surety on the building contract, although there has been no fire. Schreiber v. Worm (1904) 164 Ind. 7, 72 N. E. 852.



if he is not aware of the duty of the creditor to perform them;<sup>465</sup> and a performance of the conditions after the time has passed in which they were to be performed will not revive the surety's liability.<sup>466</sup> If the assignor of a bond undertakes to pay any deficiency which may arise on a foreclosure and sale of the mortgaged premises, he does not guaranty payment if there be no deficiency.<sup>467</sup>

The surety cannot avail himself of this defense, however, unless the creditor have notice of the conditions. Where a surety signs a negotiable instrument for a particular purpose, it can be enforced by one who had no notice that it had been diverted from that purpose.<sup>468</sup>

#### *Guaranties of Collection.*

The most common instances of guaranties subject to implied conditions are guaranties of collection;<sup>469</sup> the implied condition being that the guarantor will pay the debt if, by due diligence on the part of the creditor, it cannot be collected from the principal,<sup>470</sup> or from any prior party.<sup>471</sup> If a guaranty be both a guaranty of payment and of collection, it may be treated as an unconditional one.<sup>472</sup>

The burden is on the creditor to show that he has exercised due diligence,<sup>473</sup> and the question depends upon the circumstances of each particular case.<sup>474</sup> The institution of a suit at

<sup>465</sup> *WATTS v. SHUTTLEWORTH*, 5 Hurl. & N. 236, 7 Hurl. & N. 355.

<sup>466</sup> *Cunningham v. Wrenn*, 23 Ill. 64.

<sup>467</sup> *McMURRAY v. NOYES*, 72 N. Y. 523, 28 Am. Rep. 180.

<sup>468</sup> *McWilliams v. Mason*, 31 N. Y. 294.

<sup>469</sup> See chapter I, note 76.

<sup>470</sup> *Foster v. Barney*, 3 Vt. 60.

<sup>471</sup> *Summers v. Barrett*, 85 Iowa, 292, 21 N. W. 646; *Cady v. Sheldon*, 38 Barb. (N. Y.) 103; *Moakley v. Riggs*, 19 Johns. (N. Y.) 69, 10 Am. Dec. 196; *Benton v. Fletcher*, 31 Vt. 418. If the principal be an insolvent corporation, it is not necessary for the creditor to exhaust the statutory liability of the stockholders before resorting to the guarantor. *National Ass'n v. Lichtenwalner*, 100 Pa. 100, 45 Am. Rep. 359.

<sup>472</sup> *Tuton v. Thayer*, 47 How. Prac. (N. Y.) 180.

<sup>473</sup> *Allen v. Rundle*, 50 Conn. 9, 47 Am. Rep. 599; *Aldrich v. Chubb*, 35 Mich. 350; *Craig v. Parkis*, 40 N. Y. 181, 100 Am. Dec. 469; *Curtis v. Smallman*, 14 Wend. (N. Y.) 231; *French v. Marsh*, 29 Wis. 649.

<sup>474</sup> *Voorhies v. Atlee*, 29 Iowa, 49; *Tiffany v. Willis*, 30 Hun (N.

the next regular term of court after maturity of the obligation, and obtaining judgment and execution thereon as soon as practicable under the ordinary rules and practices of the court, and return of the execution unsatisfied, is prima facie evidence of insolvency,<sup>475</sup> though if the principal has removed from the state,<sup>476</sup> or is financially irresponsible,<sup>477</sup> the institution of legal proceedings, in most states,<sup>478</sup> is unnecessary.

Where there are several principals, the creditor must show

Y.) 286; *Thomas v. Woods*, 4 Cow. (N. Y.) 173; *Jones v. Ashford*, 79 N. C. 172; *National Loan Soc. v. Lichtenwalner*, 100 Pa. 100, 45 Am. Rep. 359; *Dutton v. Pyle* (1900) 195 Pa. 8, 45 Atl. 429; *Benton v. Gibson*, 1 Hill (S. C.) 56; *Graham v. Bradley*, 24 Tenn. (5 Humph.) 476; *Shepard v. Phears*, 35 Tex. 763; *Wheeler v. Lewis*, 11 Vt. 265; *Getty v. Schantz*, 100 Fed. 577, 40 C. C. A. 560.

<sup>475</sup> *Lawson v. Wright*, 21 Ga. 242; *Voorhies v. Atlee*, 29 Iowa, 49; *Schermerhorn v. Conner*, 41 Mich. 374, 1 N. W. 955; *Chatham Nat. Bank v. Pratt*, 135 N. Y. 423, 32 N. E. 236; *Brown v. Brooks*, 25 Pa. 210; *Getty v. Schantz*, 101 Wis. 229, 77 N. W. 191. The return unsatisfied of an execution issued by a justice of the peace is not prima facie evidence of the insolvency of the principal, as real property cannot be levied upon under such an execution. *Gilbert v. Henck*, 30 Pa. 205.

<sup>476</sup> *Mosier v. Waful*, 56 Barb. (N. Y.) 80; *White v. Case*, 13 Wend. (N. Y.) 543; *Towns v. Farrar*, 2 Hawks (N. C.) 163; *Benton v. Gibson*, 1 Hill (S. C.) 56; *Jones v. Greenlaw*, 6 Cold. (Tenn.) 342.

<sup>477</sup> *Perkins v. Catlin*, 11 Conn. 213, 29 Am. Dec. 282; *Pittman v. Chisolm*, 43 Ga. 442; *Dillman v. Nadelhoffer*, 160 Ill. 121, 43 N. E. 378; *Durand v. Bowen*, 73 Iowa, 573, 35 N. W. 644; *Gilligan v. Boardman*, 29 Me. 79; *Lewis v. Hoblitzell*, 6 Gill & J. (Md.) 259; *Miles v. Linnell*, 97 Mass. 298; *Jones v. Ashford*, 79 N. C. 172; *Stone v. Rockefeller*, 29 Ohio St. 625; *Woods v. Sherman*, 71 Pa. 100; *McClurg v. Fryer*, 15 Pa. 293; *Cates v. Kittrell*, 7 Helsk. (Tenn.) 606; *Texas City Imp. Co. v. Griswold* (Tex. Civ. App. 1900) 41 S. W. 513; *Bull v. Bliss*, 30 Vt. 127; *Camden v. Doremus*, 8 How. (U. S.) 515, 11 L. Ed. 705. Insolvency, in this connection, means such utter insolvency that action against the principal would be fruitless, and does not mean that the principal has not enough to meet all of his obligations. *BRACKETT v. RICH*, 23 Minn. 485, 23 Am. Rep. 703.

<sup>478</sup> In some states suit is necessary anyway, on the principle that conditions must be performed although injury does not result to the guarantor from nonperformance. *Bosman v. Akeley*, 39 Mich. 710, 33 Am. Rep. 447; *Craig v. Parkis*, 40 N. Y. 181, 100 Am. Dec. 469; *Blanding v. Cohen*, 101 App. Div. 442, 92 N. Y. Supp. 93; *French v. Marsh*, 29 Wis. 649.

due diligence as to all of them;<sup>479</sup> if the debt be due in installments, due diligence must be used as to each installment;<sup>480</sup> and if the debt be secured by a mortgage, which is in the control of the creditor, he must exhaust that before resorting to the guarantor.<sup>481</sup>

Where a note was guarantied to be "good and collectible two years," the guaranty was held to cover two years from the maturity of the note, as it was not collectible until it was due.<sup>482</sup>

#### **SURETY DISCHARGED IF CREDITOR RELINQUISH OR LOSE SECURITY.**

**127. If the creditor has in his possession means for satisfying his debt against the principal, and such means are relinquished by his act, or lost through his negligence, a surety for the debt is discharged to the extent of such means so relinquished or lost.**

##### *Relinquishment of Security.*

It sometimes happens that the principal or a third person has given the creditor collateral security for the debt, such as a mortgage or pledge of property. If, after the receipt of such security, the creditor release it, or any part of it, the surety is discharged<sup>483</sup> to the extent of the value of the se-

<sup>479</sup> Aldrich v. Chubb, 35 Mich. 350.

<sup>480</sup> Sherman v. Pedrick, 35 App. Div. 15, 54 N. Y. Supp. 467.

<sup>481</sup> Barman v. Carhartt, 10 Mich. 338; Johnson v. Shepard, 85 Mich. 115; Dewey v. Investment Co., 48 Minn. 130, 50 N. W. 1032, 31 Am. St. Rep. 623; Newell v. Fowler, 23 Barb. (N. Y.) 628; Brainard v. Reynolds, 36 Vt. 614; Borden v. Gilbert, 13 Wis. 670.

<sup>482</sup> Marsh v. Day, 18 Pick. (Mass.) 321.

<sup>483</sup> Winston v. Yeargin, 50 Ala. 340; Hubbard v. Pace, 34 Ark. 80; Stallings v. Bank, 59 Ga. 701; Rogers v. School Trustees, 46 Ill. 428; Foss v. Chicago, 34 Ill. 488; Welk v. Pugh, 92 Ind. 382; Bank of Monroe v. Gifford, 79 Iowa, 300, 44 N. W. 558; Union Bank v. Cooley, 27 La. Ann. 202; Cummings v. Little, 45 Me. 183; Guild v. Butler, 127 Mass. 386; Baker v. Briggs, 8 Pick. (Mass.) 122, 19 Am. Dec. 311; Ives v. Bank of Lansingburgh, 12 Mich. 361; Willis v. Davis, 3 Minn. 17 (Gil. 1); Clopton v. Spratt, 52 Miss. 251; Taylor v. Jeter, 23 Mo. 244; Dillon v. Russell, 5 Neb. 484; New Hamp-

curity released. The rule applies to any means which the creditor has for the satisfaction of his claim. If the creditor has obtained a judgment against the principal, which has become a lien upon the property of the latter, or if he has attached or levied upon the property of the principal, any action taken by the creditor which has the effect of releasing the lien of the judgment,<sup>484</sup> or of the levy,<sup>485</sup> or of the attach-

shire Sav. Bank v. Colcord, 15 N. H. 119, 41 Am. Dec. 685; Third Nat. Bank of Malone v. Shields, 55 Hun, 274, 8 N. Y. Supp. 298; HAYS v. WARD, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; Day v. Ramey, 40 Ohio St. 446; Brown v. Rathburn, 10 Or. 158; Templeton v. Shakley, 107 Pa. 370; Neff's App., 9 Watts & S. (Pa.) 36; Otis v. Van Storch, 15 R. I. 41, 23 Atl. 39; Nelson v. Williams, 22 N. C. 118; Hoss v. Crouch (Tenn.) 48 S. W. 724; Kiam v. Cummings (1890) 13 Tex. Civ. App. 198, 36 S. W. 770; Austin v. Belknap, 54 Vt. 495; Loop v. Summers, 3 Rand. (Va.) 511; Plankinton v. Gorman, 93 Wis. 560, 67 N. W. 1128; Brown v. Bank, 112 Fed. 901, 50 C. C. A. 602, 56 L. R. A. 870; American Bonding Co. v. Pueblo Co. (C. C. A.) 150 Fed. 17; POLAK v. EVERETT (1876) 1 Q. B. D. 669; PLEDGE v. BUSS, Johnson, 663; 40 Cent. Dig. col. 1952. For similar rule as to the relinquishment or loss of security given to a co-surety, see post, § 172 (f).

<sup>484</sup> Hollingsworth v. Tanner, 44 Ga. 11; Dunn v. Parsons, 40 Hun (N. Y.) 77; Jones v. Hawkins, 60 Pa. 52; First Nat. Bank of Cumberland v. Parsons, 42 W. Va. 137, 24 S. E. 554; Mellish v. Green, 5 Grant, Ch. 655.

<sup>485</sup> Winston v. Yeargin, 50 Ala. 340; Mulford v. Estudillo, 23 Cal. 94; Thomas v. Wason, 8 Colo. App. 452, 46 Pac. 1079; Houston v. Hurley, 2 Del. Ch. 247; Brinton v. Gerry, 7 Ill. App. 238; Sterne v. Vincennes Bank, 79 Ind. 549; Green v. Blunt, 59 Iowa, 79, 12 N. W. 762; Alexander v. Bank of Commonwealth, 7 J. J. Marsh. (Ky.) 580; Comstock v. Creon, 1 Rob. 528; Chipman v. Todd, 60 Me. 282; Moss v. Pettingill, 3 Minn. 217 (Gil. 145); Brown v. Kidd, 34 Miss. 291; Priest v. Watson, 75 Mo. 110, 42 Am. Rep. 409; Bronson v. McCormick Co. (1897) 52 Neb. 342, 72 N. W. 312; Depeyster v. Hildreth, 2 Barb. Ch. (N. Y.) 109; Pease v. Tilt, 9 Daly (N. Y.) 229; Cooper v. Wilcox, 22 N. C. (2 Dev. & Bat. Eq.) 90, 32 Am. Dec. 695; Dixon v. Ewing, 3 Ohio (3 Ham.) 280, 17 Am. Dec. 590; Stephens v. Monongahela Nat. Bank, 88 Pa. 157, 32 Am. Rep. 438; Commonwealth v. Vanderslice, 8 Serg. & R. (Pa.) 452; Hutton v. Campbell, 78 Tenn. (10 Lea) 170; Parker v. Nations, 33 Tex. 210; Baird v. Rice, 1 Call. (Tenn.) 18, 1 Am. Dec. 497; McKenzle v. Wiley, 27 W. Va. 658; Hyde v. Rogers, 59 Wis. 154, 17 N. W. 127; 40 Cent. Dig. col. 1970. A distinction is taken between a levy on real property and one on personal property, as the former is formal merely, and does not affect

ment,<sup>486</sup> will release the surety to the same extent. If the creditor hold notes which could be made available as collateral security, a surrender of the notes discharges a surety on the debt for which such notes were given as security.<sup>487</sup>

If the creditor has money or other property of the principal, which the creditor has a right to retain and appropriate to the satisfaction of the debt, a surety would be discharged by a delivery of such money or property to the principal;<sup>488</sup> or, if the creditor has sold the property, he must account for the proceeds,<sup>489</sup> and he will not be allowed to apply all of such proceeds upon another debt of the principal to him.<sup>490</sup> As will be seen in a subsequent section, a surety, upon payment of the debt, is entitled to be subrogated to any securities held by the creditor,<sup>491</sup> and to enforce them against the principal; and if the creditor, by his act, has deprived the surety of such means of reimbursing himself, to that extent the surety will be discharged.<sup>492</sup>

the lien of the judgment. *Herrick v. Swartwout*, 72 Ill. 340; *Gregory v. Stark*, 4 Ill. 611.

<sup>486</sup> *Maquoketa v. Willey*, 35 Iowa, 323; *Missouri Bank v. Matson*, 24 Mo. 333; *Spring v. George*, 50 Hun, 227, 3 N. Y. Supp. 43; *Twiggs v. Bank*, 26 S. C. 612, 2 S. E. 398; *Ashby's Adm'r v. Smith's Ex'r*, 9 Leigh (Va.) 164. A release of an attachment will release a surety on a bond given in consideration that there were to be no more attachments. *National Surety Co. v. Walker* (1904) 126 Iowa, 518, 101 N. W. 780.

<sup>487</sup> *Ingalls v. Morgan*, 10 N. Y. 178.

<sup>488</sup> *Perrine v. Insurance Co.*, 22 Ala. 575; *Commonwealth v. Vanderslice*, 8 Serg. & R. (Pa.) 452. A surrender by the creditor of property of the principal releases a pledge for the same debt made by a third party. *In re Sanderson* (D. C.) 150 Fed. 236.

<sup>489</sup> *COATES v. COATES*, 33 Beav. 249; *PEARL v. DEACON*, 3 Jur. (N. S.) 879, 24 Beav. 186. See post, § 132.

<sup>490</sup> If the creditor have secured and unsecured debts owing him by the principal, such proceeds must be apportioned. *Peters v. Merchants' Bank*, 149 Fed. 373, 79 C. C. A. 193; *PEARL v. DEACON*, 24 Beav. 186, 3 Jur. (N. S.) 879.

<sup>491</sup> See post, § 151.

<sup>492</sup> *Kirkpatrick v. Howk*, 80 Ill. 122; *Crim v. Fleming*, 101 Ind. 154; *Kennedy v. Bossiere*, 16 La. Ann. 445; *Payne v. Commercial Bank*, 14 Miss. (6 Smedes & M.) 24; *Saline County v. Bule*, 65 Mo. 63; *Bangs v. Strong*, 4 N. Y. 315; *La Farge v. Herter*, 11 Barb. (N. Y.) 159; *Boschert v. Brown*, 72 Pa. (22 P. F. Smith) 372; *Allen v.*

*Losing Security.*

The rule is the same where the creditor negligently has lost the security,<sup>493</sup> as by a failure to record a mortgage, whereby the mortgaged property has been taken by other creditors of the principal.<sup>494</sup>

If the surety pay the debt in ignorance of a release or loss of security by the creditor, he may recover from the creditor the money so paid.<sup>495</sup> If the creditor has obtained a judgment against the principal and surety, and afterwards releases security, the surety can have the judgment as to him perpetually enjoined.<sup>496</sup> A promise by the principal to pay the debt out of the proceeds of particular property, which he fails to do, will not affect the rights of the creditor, if the latter have no means of enforcing the principal's promise.<sup>497</sup>

*Permitting Principal to Check Out Deposit in Bank.*

Where the creditor is a bank, and at the maturity of the debt the principal had funds on deposit therein, failure by the bank to appropriate the deposit toward payment of the debt will not affect the surety's rights.<sup>498</sup> When a bank re-

Henley, 70 Tenn. (2 Lea) 141; *Bank of Manchester v. Bartlett*, 13 Vt. 315, 37 Am. Dec. 594; *Hodgson v. Shaw*, 3 Mylne & K. 183. A release of the principal from imprisonment for the debt will not discharge a surety liable therefor, although such imprisonment would have been a technical satisfaction of the debt. *Terrell v. Smith*, 8 Conn. 426.

<sup>493</sup> *Pickens v. Yarborough's Adm'r*, 26 Ala. 417, 62 Am. Dec. 728; *Hubbard v. Pace*, 34 Ark. 80; *Crim v. Fleming*, 101 Ind. 154; *Woolley v. Louisville Banking Co.*, 81 Ky. 527; *Hill v. Bourcier*, 29 La. Ann. 841; *Jennison v. Parker*, 7 Mich. 355; *Lamberton v. Windom*, 18 Minn. 506 (Gil. 455); *Wakeman v. Gowdy*, 10 Bosw. (N. Y.) 208; *Teaff v. Ross*, 1 Ohio St. 469; *Shippen's Adm'r v. Clapp*, 36 Pa. 89; *Kemmerer v. Wilson*, 31 Pa. 110; *Douglass v. Reynolds*, 7 Pet. (U. S.) 113, 8 L. Ed. 626; *CAPEL v. BUTLER*, 2 Simons & S. 457; *Margretts v. Gregory*, 10 W. R. 530.

<sup>494</sup> *Sullivan v. State*, 59 Ark. 47, 26 S. W. 194; *Toomer v. Dickerson*, 37 Ga. 428; *Burr v. Boyer*, 2 Neb. 265; *Teaff v. Ross*, 1 Ohio St. 469.

<sup>495</sup> *Chester v. Kingston Bank*, 16 N. Y. 336.

<sup>496</sup> *McMullen v. Hinkle*, 39 Miss. 142; *Storms v. Thorn*, 3 Barb. (N. Y.) 314; *Evans v. Raper*, 74 N. C. 639. See ante, § 101.

<sup>497</sup> *Wadlington v. Gary*, 7 Smedes & M. (Miss.) 522.

<sup>498</sup> *Davenport v. State Banking Co.* (1906) 126 Ga. 136, 54 S. E. 977;

ceives money on deposit, it enters into an implied contract with the depositor that it will honor checks drawn by him,<sup>499</sup> and the bank is justified in keeping its implied contract, though it has the option of applying the deposit upon the note;<sup>500</sup> but it has not this right if the deposit has been made by the principal for a special purpose.<sup>501</sup>

*Creditor Not Obligated to Obtain or Prolong Security.*

As the theory of the rule is that the act of the creditor has injured the surety by taking away his right of subrogation, it follows that any act by the creditor which in effect does not release security, or a release of which does not injure the surety, will not affect the creditor's rights. While the cred-

Drake v. Sherman, 179 Ill. 362, 53 N. E. 628; Second Nat. Bank v. Hill, 76 Ind. 223, 40 Am. Rep. 239; Citizens' Bank v. Elliott, 9 Kan. App. 797, 59 Pac. 1102; NATIONAL BANK OF NEWBURGH v. SMITH, 66 N. Y. 271, 23 Am. Rep. 48; Houston v. Braden (Tex. Civ. App.) 37 S. W. 467; Third Nat. Bank v. Harrison (C. C.) 10 Fed. 243; Strong v. Foster, 17 C. B. 201.

In the following cases it was held that the surety was discharged if the bank failed to apply the deposit on the indebtedness, provided the bank had sufficient to pay it in full. Dawson v. Real Estate Bank, 5 Ark. (5 Pike) 283; McDowell v. Bank of Wilmington, 1 Har. 369; Commercial Nat. Bank v. Henninger, 105 Pa. 496; First Nat. Bank v. Peltz, 176 Pa. 513, 35 Atl. 218, 36 L. R. A. 832, 53 Am. St. Rep. 686, 38 Wkly. Notes Cas. 444. But in Wisconsin it is the duty of the bank to apply the deposit to the indebtedness, although it does not equal the amount due; and, if there are two notes owing the bank, one-half of the deposit may be applied to each. Lowe v. Reddan (1904) 123 Wis. 90, 100 N. W. 1038. The bank has no right to apply the deposit on a note which it holds for collection merely. Ridgely Nat. Bank v. Patton, 109 Ill. 479. Nor on a note which simply is made payable there. Wood v. Merchants' Sav. Co., 41 Ill. 267. After a bank has become insolvent, a deposit should be set off against a note which it holds. Armstrong v. Warner, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466; Id., 21 Wkly. Law Bul. 136.

<sup>499</sup> Norton, Bills and Notes (3d Ed.) p. 427.

<sup>500</sup> Second Bank v. Hill, 76 Ind. 223, 40 Am. Rep. 239; Ticonic Bank v. Johnson, 21 Me. (8 Shep.) 426; Martin v. Mechanics' Bank, 6 Har. & J. (Md.) 235; NATIONAL MAHAWE BANK v. PECK, 127 Mass. 298, 34 Am. Rep. 368; National Bank v. Smith, 66 N. Y. 271; 23 Am. Rep. 48, affirming 5 Hun, 183.

<sup>501</sup> Wilson v. Dawson, 52 Ind. 513.

itor is required not to lose liens, he is under no duty to acquire them,<sup>503</sup> nor to renew them when they expire.<sup>503</sup> Thus, while an execution, if levied, might make certain property of the principal available, and a release of the levy would discharge the surety, the creditor is not required to prosecute a suit to a judgment,<sup>504</sup> nor to have an execution levied after having procured a judgment, and his failure to do so will not affect his rights,<sup>505</sup> unless it amounts to a release of the lien of the judgment;<sup>506</sup> nor will an adjournment of the sale of the property seized on execution affect the creditor's rights, although the principal takes advantage of the delay to get his property released as exempt.<sup>507</sup> A surety is not entitled to have collateral security sold before maturity, though it is in

<sup>503</sup> *Summerhill v. Tapp*, 52 Ala. 227; *Friend v. Smith Gin Co.*, 59 Ark. 86, 26 S. W. 374; *Grisard v. Hinson*, 50 Ark. 229, 6 S. W. 906; *Crawford v. Gaulden*, 33 Ga. 173; *Jerauld v. Trippet*, 62 Ind. 122; *Mingus v. Daugherty*, 87 Iowa. 56, 54 N. W. 66, 43 Am. St. Rep. 354; *FULLER v. TOMLINSON*, 58 Iowa, 111, 12 N. W. 127; *Freaner v. Yingling*, 37 Md. 491; *Clopton v. Spratt*, 52 Miss. 251; *Union Bank v. Govan*, 18 Miss. (10 Smedes & M.) 333; *Howe Machine Co. v. Farrington*, 82 N. Y. 121; *Smith v. Erwin*, 77 N. Y. 466; *Schroepf v. Shaw*, 3 N. Y. 446; *Thornton v. Thornton*, 63 N. C. 211; *Farmers' Bank v. Reynolds*, 13 Ohio, 85; *Rouss v. King*, 69 S. C. 168, 48 S. E. 220; *Knight v. Charter*, 22 W. Va. 422; *Day v. Elmore*, 4 Wis. 190.

<sup>503</sup> *Kindt's Appeal*, 102 Pa. 441; *United States v. Simpson*, 3 Pen. & W. (Pa.) 439, 24 Am. Dec. 831.

<sup>504</sup> *Owen v. State*, 25 Ind. 371; *Somerville v. Marbury*, 7 Gill & J. 275; *Barney v. Clark*, 46 N. H. 514; *Wayne v. Commercial Nat. Bank*, 52 Pa. (2 P. F. Smith) 343.

<sup>505</sup> *Summerhill v. Tapp*, 52 Ala. 227; *Thompson v. Robinson*, 34 Ark. 44; *Houston v. Hurley*, 2 Del. Ch. 247; *Lumsden v. Leonard*, 55 Ga. 374; *Jerauld v. Trippet*, 62 Ind. 122; *Woodburn v. Friend*, 19 La. 496; *Union Bank v. Govan*, 18 Miss. 333; *Smith v. Erwin*, 77 N. Y. 466; *Thornton v. Thornton*, 63 N. C. 211; *Farmers' Bank v. Reynolds*, 13 Ohio, 85; *Morrison v. Hartman*, 14 Pa. 55; *Griesmere v. Thorn*, 32 Pa. Super. Ct. 13; *Miller v. White*, 25 S. C. 235; *Miller v. Porter*, 24 Tenn. (5 Humph.) 294; *McNelly v. Cooksey*, 2 Lea (Tenn.) 39; *Hunter v. Clark*, 28 Tex. 159; *Humphrey v. Hitt*, 6 Grat. (Va.) 509, 52 Am. Dec. 133; *Knight v. Charter*, 22 W. Va. 422.

<sup>506</sup> *Sterne v. McKinney*, 79 Ind. 573; *Dills v. Cecil*, 4 Bush (Ky.) 579; *Ferguson v. Turner*, 7 Mo. 497.

<sup>507</sup> *Lilly v. Roberts*, 58 Ga. 363.



danger of destruction or depreciation;<sup>508</sup> nor is the creditor obliged to pay taxes on mortgaged land.<sup>509</sup>

A levy upon property, the sale of which would bring no returns, such as mortgaged property, may be abandoned without discharging the surety.<sup>510</sup>

*Surety Not Discharged if No Injury Results from Release of Property.*

A release of security will not discharge the surety, if the right of subrogation thereto would be of no value,<sup>511</sup> as would be the case if the principal's interest in the property is a cloud merely;<sup>512</sup> nor will a change in the form of the security affect the creditor's rights,<sup>513</sup> if made in good faith, especially if it appears to be for the benefit of all concerned. Thus, a release of part of the principal's property from a judgment lien in return for a reduction in the amount of a mortgage on another portion of the principal's property, such mortgage being a prior lien to the judgment, is advantageous to the surety, as well as to the creditor, as it makes the security better than before.<sup>514</sup> So, a release of a levy on the principal's property worth \$90, in exchange for an order for \$100 on his wife's share in her father's estate, would not discharge the surety, as the wife's property could not have been levied upon by the creditor.<sup>515</sup> Likewise, a surrender of a life insurance policy, upon receipt of its present value, after the bankruptcy of the principal had rendered it doubtful whether he could have kept up the payments, does not discharge a surety.<sup>516</sup>

<sup>508</sup> *Freehold Nat. Banking Co. v. Brick*, 37 N. J. Law, 307; *Campbell v. Macomb*, 4 Johns. Ch. (N. Y.) 534; *Cherry v. Miller*, 7 Lea (Tenn.) 305.

<sup>509</sup> *Wasson v. Hodshire*, 108 Ind. 26, 8 N. E. 621.

<sup>510</sup> *Moss v. Pettingill*, 3 Minn. 217 (Gil. 145); *Moss v. Craft*, 10 Mo. 720; *Commercial Bank of Lake Erie v. Bank*, 11 Ohio, 444, 38 Am. Dec. 739.

<sup>511</sup> *Union Nat. Bank v. Cooley*, 27 La. Ann. 202.

<sup>512</sup> *Blydenburgh v. Bingham*, 38 N. Y. 371, 98 Am. Dec. 49.

<sup>513</sup> *Norton v. Eastman*, 4 Me. 521; *Lennox v. Murphy*, 171 Mass. 370, 50 N. E. 644; *Lafayette Co. v. Hixon*, 69 Mo. 581; *State Bank v. Smith*, 155 N. Y. 185, 49 N. E. 680.

<sup>514</sup> *Neff's Appeal*, 9 Watts & S. (Pa.) 36.

<sup>515</sup> *Young v. Cleveland*, 33 Mo. 126, 82 Am. Dec. 155.

<sup>516</sup> *COATES v. COATES*, 33 Beav. 249.

A release of a mortgage by mistake will not affect a surety's rights, if the matter is corrected and the mortgage remains a valid lien;<sup>517</sup> nor will a transfer of the security to a third person necessarily discharge a surety.<sup>518</sup>

*Extent of the Surety's Release.*

The surety, in any case of relinquishment or loss of securities, is released to the extent of the value only of the property which is rendered unavailable;<sup>519</sup> and such value would be the ascertained value of the property at the time and place<sup>520</sup> the lien could have been made effective. In this respect the rule differs from some of the other rules heretofore mentioned. If an alteration<sup>521</sup> be made by the creditor, or an extension of time<sup>522</sup> be given the principal, a surety is released completely, even though the act of the creditor actually be beneficial to him; but a relinquishment or loss of securities by the creditor will not release a surety of itself, unless actual injury result,<sup>523</sup> and the creditor must show that released property could not have been made available.<sup>524</sup>

<sup>517</sup> Kane v. Williams, 99 Wis. 65, 74 N. W. 570.

<sup>518</sup> Penny v. Crane Co., 80 Ill. 244; WILBUR v. WILLIAMS, 16 R. I. 242, 14 Atl. 878; Wheatley v. Bastow, 7 De G., M. & G. 261.

<sup>519</sup> Cullum v. Emanuel, 1 Ala. 23, 34 Am. Dec. 757; Houston v. Hurley, 2 Del. Ch. 247; Stewart v. Davis, 18 Ind. 74; Rowley v. Jewett, 56 Iowa, 492, 9 N. W. 353; Barrow v. Shields, 13 La. Ann. 57; Cummings v. Little, 45 Me. 183; Baker v. Briggs, 25 Mass. (8 Pick.) 122, 19 Am. Dec. 311; Barkwell v. Swan, 69 Miss. 907, 13 South. 809; Salline County v. Bule, 65 Mo. 63; New Hampshire Bank v. Colcord, 15 N. H. 119, 41 Am. Dec. 685; DUNN v. PARSONS, 40 Hun (N. Y.) 77; Griswold v. Jackson, 2 Edw. Ch. (N. Y.) 461; Smith v. McLeod, 38 N. C. 390; Everly v. Rice, 20 Pa. (8 Harris) 297; Neff's Appeal, 9 Watts & S. (Pa.) 36; First Nat. Bank v. Parsons, 42 W. Va. 137, 24 S. E. 554; Brown v. First Nat. Bank, 132 Fed. 450, 66 C. C. A. 293.

<sup>520</sup> Bank of Monroe v. Gifford, 79 Iowa, 300, 44 N. W. 558.

<sup>521</sup> Ante, § 107.

<sup>522</sup> Ante, § 108.

<sup>523</sup> Glass v. Thompson, 9 B. Mon. (Ky.) 235; Hardwick v. Wright, 85 Beav. 133.

<sup>524</sup> DUNN v. PARSONS, 40 Hun (N. Y.) 77.

**SURETY DISCHARGED WHEN PRINCIPAL IS.**

128. A discharge of the principal discharges the surety, except where the principal is discharged through some defense personal to himself, and which does not go to the substance of the contract.

**DESTRUCTION OF PROPERTY.**

129. If the principal be discharged by a destruction of the property in regard to which the surety is liable, the surety is discharged also, unless he has undertaken absolutely that the property shall be returned.

As has been stated before, owing to the fact that the surety and principal are each liable to the creditor,<sup>525</sup> and in some cases jointly, their respective rights and liabilities being intermingled, it is difficult to make any systematic arrangement of the different defenses which might be set up in discharge of a contract of suretyship.<sup>526</sup> Up to this point an effort has been made to treat of such transactions as would discharge the surety only, leaving the principal still liable to the creditor, though some of the defenses considered, such as alteration, might be available to the principal if he had not participated therein. It is the intention to take up now the defenses which would be available to the principal as well as to the surety, though, to avoid repetition, the right of a surety to avail himself of a defense, when not available to the principal in a particular case, will be considered when that defense is treated of as a defense by both. Thus, while a release of the principal would discharge a surety,<sup>527</sup> the right of a surety alone to set up that defense will be considered in connection with a release of both.

*Surety's Liability Measured by That of Principal.*

The general rule is that the liability of the surety is commensurate with that of his principal,<sup>528</sup> and the former may

<sup>525</sup> Ante, § 95.

<sup>526</sup> See ante, § 106.

<sup>527</sup> See post, § 132, d.

<sup>528</sup> Parnell v. Hancock, 48 Cal. 452; Wattles v. Hyde, 9 Conn. 10; Gage v. Lewis, 68 Ill. 604; Winchell v. Doty, 15 Hun (N. Y.) 1; St. Albans Bank v. Dillon, 30 Vt. 122, 73 Am. Dec. 295.

set up any defense, legal or equitable,<sup>529</sup> which is available to the latter.<sup>530</sup> A judgment in favor of the principal may be set up by the sureties against the creditor.<sup>531</sup> The obligation of the surety is accessory to that of the principal; and, if there be no principal, there cannot be a surety. Where any act has been done by an obligee which may injure the surety, the court is very glad to lay hold of it in favor of the surety.<sup>532</sup> An unmarried woman took a note with sureties. Afterwards the creditor married the principal of the note, but under the provisions of their antenuptial contract the note remained the separate property of the wife. As the creditor by her marriage lost her right of action against the principal, the sureties were discharged.<sup>533</sup>

*Surety's Rights the Same After Judgment Against Him.*

The rule is not affected by the fact that a judgment has been obtained against the surety.<sup>534</sup> Thus, in a suit against a sheriff and the sureties upon his bond, judgment was recovered against all. The sheriff alone appealed, and, on final

<sup>529</sup> *Viele v. Hoag*, 24 Vt. 46; *SAMUEL v. HOWARTH*, 3 Merivale, 272.

<sup>530</sup> *Sharon v. Sharon*, 84 Cal. 433, 23 Pac. 1102; *Austin v. Ralford*, 68 Ga. 201; *Trotter v. Strong*, 63 Ill. 272; *Jamieson v. Holm*, 69 Ill. App. 119; *Hughart v. Spratt*, 78 Ky. 313; *Dickason v. Bell*, 13 La. Ann. 249; *Blackburn v. Beall*, 21 Md. 208; *Lynch v. Reynolds*, 16 Johns. (N. Y.) 41; *Brown v. Williams*, 4 Wend. (N. Y.) 360; *Bridges v. Phillips*, 17 Tex. 128; *Paddleford v. Thacher*, 48 Vt. 574. The surety has the burden of proving that he has been discharged. *Meyer v. Blakemore*, 54 Miss. 570. And to effect a discharge the agreement between the creditor and the principal must be performed. An executory agreement to discharge the principal will not be sufficient. *MILLER v. HATCH*, 72 Me. 481, 39 Am. Rep. 346. A surety is discharged when performance by the principal has become impossible by act of law. *Young v. Pickens*, 45 Miss. 553; *Caldwell v. Gans*, 1 Mont. 570. Or by act of the public enemy. *Ordinary v. Corbett*, 1 Bay (S. C.) 328.

<sup>531</sup> *State v. Parker*, 72 Ala. 181; *Brown v. Bradford*, 30 Ga. 927; *Baker v. Merriam*, 97 Ind. 539; *Crum v. Willson*, 61 Miss. 233; *State v. Coste*, 36 Mo. 437. 88 Am. Dec. 148; *Gill v. Morris*, 11 Heisk. (Tenn.) 614, 27 Am. Rep. 744.

<sup>532</sup> *Law v. East India Co.*, 4 Vesey, 824.

<sup>533</sup> *Govan v. Moore*, 30 Ark. 667. Moral: The creditor should never marry the principal.

<sup>534</sup> See ante, § 101.

trial, being acquitted, the judgment against the sureties could not be enforced.<sup>535</sup> Sureties in such a case have the right to have the judgment against them perpetually enjoined. When the liability of the principal ceased, that of the sureties ceased also, although the sureties knew all of the facts before the judgment against them, except the discharge of the principal. That was the fact which discharged them.<sup>536</sup> Where a judgment against the principal and sureties is a lien upon land, and the same person becomes owner of the land and of the judgment, the sureties would be discharged to the extent of the value of the land, into which the lien of the judgment had merged.<sup>537</sup>

*Destruction of Bailed or Leased Property.*

If a person has become liable for the return of property intrusted to the principal, he is discharged if that property be destroyed without negligence on the part of the principal or of himself, so that performance of his contract has become impossible, unless he has undertaken absolutely to be answerable in damages for a failure to return it.<sup>538</sup> Thus, where an aeronaut borrowed a balloon, which was destroyed by fire without the fault of any one, a guarantor of the return of the balloon was not liable.<sup>539</sup>

Inasmuch as a tenant of demised property is not released from his liability to pay rent by reason of the destruction of the premises, even though the landlord was fully insured, a surety for the rent remains liable.<sup>540</sup>

<sup>535</sup> Beall v. Cochran, 18 Ga. 38; McCloskey v. Wingfield, 29 La. Ann. 141; Miller v. Gaskins, Smedes & M. Ch. 524. If the sureties have paid the creditor before the judgment against the principal has been reversed, they cannot recover the money paid. Garr v. Martin, 20 N. Y. 306.

<sup>536</sup> AMES v. MACLAY, 14 Iowa, 281.

<sup>537</sup> WRIGHT v. KNEPPER, 1 Barr (Pa.) 361.

<sup>538</sup> Steele v. Buck, 61 Ill. 343, 14 Am. Rep. 60; Clapp v. Seifbrecht, 11 La. Ann. 528; Carpenter v. Stevens, 12 Wend. (N. Y.) 589.

<sup>539</sup> Meridian Fair Ass'n v. North Birmingham Ry. Co., 70 Miss. 808, 12 South. 555.

<sup>540</sup> Kingsbury v. Westfall, 61 N. Y. 356.

**PERSONAL DEFENSES OF PRINCIPAL NOT AVAILABLE TO SURETY.**

130. Personal defenses of the principal, which are not available to the surety, are:

- (a) Those arising from incapacity at the time of the execution of the contract.
  - (1) Infancy.
  - (2) Coverture.
  - (3) Insanity.
  - (4) Ultra vires act of a corporation.
- (b) Those arising subsequently by operation of law.
  - (1) Bankruptcy.
  - (2) The statute of limitations.
  - (3) Alien enemy.

**PERSONAL DEFENSES OF SURETY.**

131. A surety may be discharged by bankruptcy or the statute of limitations, though the principal remain liable.

The right of the surety to set up defenses available to the principal are restricted to such as are inherent to the debt, known as "real defenses," and does not extend to such as are personal to the principal,<sup>541</sup> and not connected with any act or negligence on the part of the creditor. Incompetency of the surety himself, as a defense, has been considered heretofore.<sup>542</sup>

Personal defenses available to the principal, but not to the surety, are such as arise from the incompetency of the principal at the time the contract was entered into, or which arise subsequently by operation of law. A contract of suretyship imports that the principal is competent to contract,<sup>543</sup> and the liability of the surety in such cases is not tested by his

<sup>541</sup> Jones v. Crosthwaite, 17 Iowa, 393; Robinson v. Robinson, 11 Bush (Ky.) 174; Foxworth v. Bullock, 44 Miss. 457; Harley v. Stapleton's Adm'r, 24 Mo. 248; Erwin v. Downs, 15 N. Y. 576; Unangst v. Fittler, 84 Pa. 135; Hesser v. Steiner, 5 Watts & S. (Pa.) 478; Smyley v. Head, 2 Rich. Law (S. C.) 590, 45 Am. Dec. 750; Hicks v. Randolph, 62 Tenn. (3 Baxt.) 352, 27 Am. Rep. 760.

<sup>542</sup> Ante, § 52.

<sup>543</sup> Remsen v. Graves, 41 N. Y. 471; Zabriskie v. Cleveland R. Co., 23 How. (U. S.) 399, 16 L. Ed. 488.

right to recover indemnity from the principal.<sup>544</sup> The disability of the principal may be the very reason why the surety was required.<sup>545</sup>

*Infancy of Principal.*

A surety for an infant is bound, though the contract of the infant is voidable,<sup>546</sup> and though the infant disaffirm the contract;<sup>547</sup> but if the infant, after disaffirming his contract, return the consideration, the surety would be discharged.<sup>548</sup> It would be unjust for the creditor to get back his property, and, in addition, be able to recover from the surety.

*Coverture of Principal.*

Sureties for a married woman are liable, though she be not.<sup>549</sup> Thus, where a married woman bought real estate, giving her note, with sureties, for the purchase price, title to the property passed to her, although her note was void, and the sureties were liable, although she could not be held.<sup>550</sup>

*Insanity of Principal.*

If the payee of a note be ignorant of the principal's insanity, a surety thereon can be held, though the principal is not liable.<sup>551</sup>

<sup>544</sup> See post, § 159.

<sup>545</sup> *Smyley v. Head*, 2 Rich. Law (S. C.) 590, 45 Am. Dec. 750; *YORKSHIRE CO. v. MACLURE*, L. R. 19 Ch. D. 478.

<sup>546</sup> *Keokuk County State Bank v. Hall*, 106 Iowa, 540, 76 N. W. 832; *Hesser v. Steiner*, 5 Watts & S. (Pa.) 476; *Goodell v. Bates*, 14 R. I. 65.

<sup>547</sup> *Kyger v. Sipe*, 89 Va. 507, 16 S. E. 627.

<sup>548</sup> *Keokuk Bank v. Hall*, 106 Iowa, 540, 76 N. W. 832; *BAKER v. KENNETT*, 54 Mo. 82. This might be equivalent to payment, or could be treated as failure of consideration.

<sup>549</sup> *Stillwell v. Bertrand*, 22 Ark. 375; *Davis v. Statts*, 43 Ind. 103, 13 Am. Rep. 382; *Allen v. Berryhill*, 27 Iowa, 534, 1 Am. Rep. 309; *Adams v. Curny*, 15 La. Ann. 485; *Winn v. Sanford*, 145 Mass. 302, 14 N. E. 119, 1 Am. St. Rep. 461; *McGavock v. Whitfield*, 45 Miss. 452; *Weed Sewing Mach. Co. v. Maxwell*, 63 Mo. 486; *Wagoner v. Watts*, 44 N. J. Law (15 Vroom) 126; *KIMBALL v. NEWELL*, 7 Hill (N. Y.) 116; *WEARE v. SAWYER*, 44 N. H. 198; *Davis v. Commissioners*, 72 N. C. 441; *Wiggins' Appeal*, 100 Pa. 155; *Smyley v. Head*, 2 Rich. Law (S. C.) 590, 45 Am. Dec. 750; *St. Albans Bank v. Dillon*, 30 Vt. 122, 73 Am. Dec. 295.

<sup>550</sup> *Foxworth v. Bullock*, 44 Miss. 457; *Willingham v. Leake*, 66 Tenn. (7 Baxt.) 453.

<sup>551</sup> *LEE v. YANDELL*, 69 Tex. 34, 6 S. W. 665.

*Ultra Vires Acts of Principal.*

Sureties on corporate obligations may be liable, though the corporation has exceeded its powers.<sup>552</sup>

*Bankruptcy of Principal.*

If the principal be discharged by the agency of the law in which the creditor does not participate, the surety remains liable. Thus, a discharge of the principal under the bankruptcy or insolvency laws will not result in a discharge of the surety,<sup>553</sup> though it deprive the latter of all recourse against the principal for whatever he is compelled to pay. It makes no difference that the creditor joins with the other creditors in petitioning for involuntary bankruptcy proceedings<sup>554</sup> and in proposing composition.<sup>555</sup>

Under the present national bankruptcy act of 1898 (section 57i) a surety has the right to prove the creditor's claim against the bankrupt's estate in the creditor's name, if the creditor fail to do so.

<sup>552</sup> State v. Fortinberry, 54 Miss. 316; WEARE v. SAWYER, 44 N. H. 198; Remsen v. Graves, 41 N. Y. 471; Davis v. Commissioners, 72 N. C. 441; Mason v. Nichols, 22 Wis. 376; YORKSHIRE RAILWAY WAGON CO. v. MACLURE (1881) L. R. 19 Ch. D. 478. Contra, Edwards County v. Jennings (Tex. Civ. App. 1895) 33 S. W. 585.

<sup>553</sup> Section 16a of the national bankruptcy act of July 1, 1898 (30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]). And see Smith v. Gillam, 80 Ala. 296; Rosenthal v. Perkins, 123 Cal. 240, 55 Pac. 804; Lackey v. Steere, 121 Ill. 598, 13 N. E. 518, 2 Am. St. Rep. 135; Post v. Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; Ray v. Brenner, 12 Kan. 105; Moore v. Waller's Heirs, 8 Ky. (1 A. K. Marsh.) 488; Serra é Hijo v. Hoffman, 30 La. Ann. 67; Bernhelmer v. Charak, 170 Mass. 179, 49 N. E. 81; Cochrane v. Cushing, 124 Mass. 219; Ames v. Wilkinson, 47 Minn. 148, 49 N. W. 696; Robinson v. Soule, 56 Miss. 549; Claflin v. Cogan, 48 N. H. 411; McCombs v. Allen, 82 N. Y. 114; Wilson v. Field, 27 Hun (N. Y.) 46; Commercial Nat. Bank of Charlotte v. Simpson, 90 N. C. 467; Sharpe v. Speckenagle, 3 Serg. & R. (Pa.) 463; Easton v. Ormsby, 18 R. I. 309, 27 Atl. 216; Jackson v. Patrick, 10 S. C. (10 Rich.) 197; National Lead Co. v. Montpeller Hardware Co., 73 Vt. 119, 50 Atl. 809; Ewing's Adm'r v. Ferguson's Adm'r, 33 Grat. (Va.) 548; Wolf v. Stix, 99 U. S. 1, 25 L. Ed. 309; Cowper v. Smith, 4 Mees. & W. 519. Contra, Choate v. Quinichett, 12 Helsk. (Tenn.) 427.

<sup>554</sup> Thornton v. Thornton, 63 N. C. 211.

<sup>555</sup> GUILD v. BUTLER, 122 Mass. 498, 23 Am. Rep. 378; Ex parte Jacobs, L. R. 10 Ch. 211.



The fact that the creditor has proved his claim in insolvency proceedings does not prevent an action against a surety.<sup>556</sup> If a surety is liable for a part only of the creditor's claim, the creditor cannot apply the dividends received by him from the bankrupt principal's estate, on the unsecured part of the debt, and hold the surety liable for the entire amount for which the latter is surety; but the surety must have the benefit of the dividends pro rata.<sup>557</sup>

*Bankruptcy of Surety.*

The discharge in bankruptcy of a surety on the bond of an officer will not discharge him from liability for defaults occurring after the discharge,<sup>558</sup> though he has been discharged as to those which might have been proved against his estate.<sup>559</sup> If the surety, after his discharge in bankruptcy, makes an express promise to pay, although not in writing,<sup>560</sup> his liability will revive.<sup>561</sup> A declaration of an intention to pay will not be sufficient.<sup>562</sup> The promise must be unconditional;<sup>563</sup> or, if conditional, a compliance with the conditions must be shown.<sup>564</sup>

*Bankruptcy of Co-Surety.*

The bankruptcy of a co-surety has no effect upon the liability of the remaining sureties to the creditor.<sup>565</sup>

<sup>556</sup> *Gregg v. Wilson*, 50 Ind. 490; *Harris v. Hayes*, 171 Mass. 275, 50 N. E. 532.

<sup>557</sup> *GRAY v. SECKHAM* (1872) 7 Ch. App. 680; *BARDWELL v. LYDALL*, 7 Bing. 489.

<sup>558</sup> *Jones v. Knox*, 46 Ala. 53, 7 Am. Rep. 583; *Reitz v. People*, 72 Ill. 435, 16 Bank. Reg. 96; *Simpson v. Simpson*, 80 N. C. 332.

<sup>559</sup> *TOBIAS v. ROGERS*, 13 N. Y. 59; *Allen v. McMinn*, 76 N. C. 395. The liability of a bankrupt indorser can be proved against his estate, although the paper is not due until after filing petition, but is due within one year. *In re Phillip Semmer Glass Co., Limited*, 11 Am. Bankr. Rep. 665, affirmed 135 Fed. 77, 67 C. C. A. 551.

<sup>560</sup> *Kull v. Farmer*, 78 N. C. 339.

<sup>561</sup> *Marshall v. Tracy*, 74 Ill. 379; *Dusenbury v. Hoyt*, 53 N. Y. 521, 13 Am. Rep. 543.

<sup>562</sup> *Willets v. Cotherson*, 3 Ill. App. 644.

<sup>563</sup> *Randidge v. Lyman*, 124 Mass. 361; *Stern v. Nussbaum*, 5 Daly (N. Y.) 382; *Moseley v. Coldwell*, 62 Tenn. 208; *Allen v. Ferguson*, 18 Wall. (U. S.) 1, 21 L. Ed. 854.

<sup>564</sup> *Apperson v. Stewart*, 27 Ark. 619.

<sup>565</sup> *Sacramento County v. Bird*, 31 Cal. 67.

*Debt Barred as to Principal.*

The rights of the creditor against the surety are not affected by the fact that the debt is barred against the principal, whether the debt was barred at the time the contract of suretyship was entered into,<sup>566</sup> or subsequently.<sup>567</sup> It sometimes happens that, owing to the removal of the principal to another state, the statute of limitations runs as to one of the parties before it does as to the other. The rights of the creditor are not affected by his failure to present the claim against the estate of a deceased principal,<sup>568</sup> unless he is required to do so by statute.<sup>569</sup> It is the duty of the surety, if he would protect himself, to pay the claim and file it against the estate.

*Debt Barred as to Surety.*

The surety can avail himself of the defense of the statute of limitations independently of the principal.<sup>570</sup> The statute begins to run in favor of a surety when he is liable to a suit, and this may or may not be at the same time the principal be-

<sup>566</sup> *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403; *Miles v. Linnell*, 97 Mass. 298; *Worcester Bank v. Hill*, 113 Mass. 25; *Flack v. Neill*, 22 Tex. 253.

<sup>567</sup> *Hooks v. Bank*, 8 Ala. 580; *Dye v. Dye*, 21 Ohio St. 86, 8 Am. Rep. 40; *Richards v. Commonwealth*, 40 Pa. 146; *Marshall v. Hudson*, 9 Yerg. (Tenn.) 57; *Nelson v. Bank*, 69 Fed. 798, 16 C. C. A. 425, 32 U. S. App. 534. Contra, *AUCHAMPAUGH v. SCHMIDT*, 70 Iowa, 642, 27 N. W. 805, 59 Am. Rep. 459. And see *Bridges v. Blake*, 106 Ind. 332, 6 N. E. 833, where it was held that a mortgage given by a surety could not be enforced if the debt was barred as to the principal. Where a mortgagee recognized the grantee of the land, who had assumed the debt, as the principal debtor, he could not hold the original mortgagor after the debt was barred as to such grantee. *Mulvane v. Sedgley*, 63 Kan. 105, 64 Pac. 1038, 55 L. R. A. 552. In *Charbonneau v. Bouvet*, 98 Tex. 167, 82 S. W. 460, it was held that a debt barred as to the principal could be collected from the estate of a deceased surety; death having suspended the statute as to the latter. Where there is a special limitation as to official bonds, a surety is discharged when the principal is. *State v. Blake*, 2 Ohio St. 151.

<sup>568</sup> *Hooks v. Branch Bank*, 8 Ala. 580; *Banks v. State*, 62 Md. 88; *Moore v. Gray*, 26 Ohio St. 525; *Willis v. Chowning*, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842.

<sup>569</sup> *Waughop v. Bartlett*, 165 Ill. 124, 46 N. E. 197.

<sup>570</sup> *Mozingo v. Ross*, 150 Ind. 688, 50 N. E. 867, 41 L. R. A. 612, 65 Am. St. Rep. 387; *Dawes v. Shed*, 15 Mass. 6, 8 Am. Dec. 80.

comes liable.<sup>571</sup> Generally the statute begins to run in favor of a guarantor upon the default of the principal.<sup>572</sup> It begins to run against a surety on the bond of an officer from the time of demand upon the officer for a settlement,<sup>573</sup> although such demand must be made in a reasonable time; and, if no demand be made, one will be presumed after a lapse of time equal to the statutory period of limitation.<sup>574</sup>

*Running of Statute Prevented by Fraud.*

Where the statute does not begin to run against the principal because of fraud in concealing his defalcation, the running of the statute is suspended likewise as to the surety, although the latter be innocent.<sup>575</sup>

*Running of Statute Suspended by New Promise.*

The statute of limitations is one of repose, its object being to secure promptness in pressing unpaid claims; and, as it does not make the contract invalid, but unenforceable merely, the defense may be waived, and it is waived by a new promise by the surety to pay the debt,<sup>576</sup> and the statute begins running again from the time of such new promise, whether the debt was or was not barred at that time. Such new promise may be oral, unless required by the statute to be in writing, though it must show clearly a recognition of the debt and an intention to pay it.

<sup>571</sup> *Hooper v. Hooper*, 81 Md. 155, 31 Atl. 508, 48 Am. St. Rep. 496; *Wofford v. Unger*, 55 Tex. 480. The statute begins to run on a demand note the day it is given by the sureties, although they agreed to be liable without notice as long as any liability on the part of the principal existed. *Newell v. Clark*, 73 N. H. 289, 61 Atl. 555. Where a statute provides that suit must be brought within two years after the default of the principal, it means his first default. *United States v. Mark*, 3 Wall. Jr. 358, Fed. Cas. No. 11,990.

<sup>572</sup> *State Bank v. Knotts*, 10 Rich. Law, 543, 70 Am. Dec. 234.

<sup>573</sup> *Soule v. Norwood*, 30 La. Ann. 486; *Kirk v. Sportsman*, 48 Mo. 383.

<sup>574</sup> *Keithler v. Foster*, 22 Ohio St. 27.

<sup>575</sup> *EISING v. ANDREWS*, 66 Conn. 58, 33 Atl. 585, 50 Am. St. Rep. 75; *McMullen v. Winfield Bldg. Ass'n*, 64 Kan. 298, 67 Pac. 892, 56 L. R. A. 924, 91 Am. St. Rep. 236.

<sup>576</sup> *Perkins v. Cheney*, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495.

*Running of Statute Suspended by Part Payment.*

A waiver of the defense of the statute of limitations may be shown likewise by a part payment of the debt, as that is a recognition of the existence of the obligation.<sup>577</sup> While, under the old common-law rule, a part payment by one of two or more joint debtors would revive the liability of all, the modern rule is that part payment by a principal debtor will not revive the liability of a surety jointly liable with him.<sup>578</sup> In some states this is the result of statutory enactment.<sup>579</sup> A distinction is made, in some jurisdictions, between a payment by the principal before the debt is barred as to the surety and a payment after that time, holding, in the first case, that the statute is started anew as to both,<sup>580</sup> but that part payment by the principal after the debt is barred as to the surety will not affect the latter.<sup>581</sup>

If the principal and surety are not jointly liable, payment by the former cannot affect the rights and liabilities of the latter in any case.<sup>582</sup>

<sup>577</sup> *Hinds v. Ingham*, 31 Ill. 400.

<sup>578</sup> *Waughop v. Bartlett*, 165 Ill. 124, 46 N. E. 197; *Mozingo v. Ross*, 150 Ind. 688, 50 N. E. 867, 41 L. R. A. 612, 65 Am. St. Rep. 387; *Steele v. Souder*, 20 Kan. 39; *Mainzinger v. Mohr*, 41 Mich. 685, 3 N. W. 183; *Pfenninger v. Kokesch*, 68 Minn. 81, 70 N. W. 867; *Whipple v. Stevens*, 22 N. H. 219; *McMullen v. Rafferty*, 89 N. Y. 456; *Shoemaker v. Benedict*, 11 N. Y. 176, 62 Am. Dec. 95; *Hance v. Hair*, 25 Ohio St. 349; *Coleman v. Fobes*, 22 Pa. 156, 60 Am. Dec. 75; *Walters v. Craft*, 23 S. C. 578, 55 Am. Rep. 44.

<sup>579</sup> *Quimby v. Putnam*, 28 Me. 419; *Peirce v. Tobey*, 5 Metc. (Mass.) 168; *Carlton v. Coffin*, 27 Vt. 496; *Coleman v. Ward*, 85 Wis. 328, 55 N. W. 695; *Cockerill v. Sparkes*, 1 H. & C. 699.

<sup>580</sup> *Tillinghast v. Nourse*, 14 Ga. 641; *Block v. Dorman*, 51 Mo. 31; *Corlies v. Fleming*, 30 N. J. Law, 349; *Copeland v. Collins*, 122 N. C. 619, 30 S. E. 315; *Woonsocket Inst. v. Ballou*, 16 R. I. 355, 16 Atl. 144, 1 L. R. A. 555.

<sup>581</sup> *Borden v. Peay*, 20 Ark. 293; *Kimble v. Cummins*, 3 Metc. (Ky.) 327; *Hooper v. Hooper*, 81 Md. 155, 31 Atl. 508, 48 Am. St. Rep. 496; *Long v. Miller*, 93 N. C. 227; *Goudy v. Gillam*, 6 Rich. Law (S. C.) 28.

<sup>582</sup> *Hunter v. Robertson*, 30 Ga. 479. A part payment by the principal cannot affect the liability of a guarantor. *Mende v. McDowell*, 5 Bin. (Pa.) 195. Nor of an indorser. *Maddox v. Duncan*, 143 Mo. 613, 45 S. W. 688, 41 L. R. A. 581, 65 Am. St. Rep. 678.

*Corporate Suretyship.*

In bonds executed by corporate sureties, a provision is made sometimes that an action must be brought on the bond within a designated period, which is shorter than the statutory one. Such conditions are valid, and will be enforced by the courts,<sup>583</sup> unless delay is unavoidable.<sup>584</sup> The business of a large corporation cannot be conducted successfully, unless claims are presented within such time as will enable a full investigation to be made while those who have knowledge of the facts are accessible and the facts fresh in their memories.

*Declaration of War.*

A surety remains liable although, on account of war being declared, the principal, for the time being, has become an alien enemy.<sup>585</sup>

**PAYMENT, TENDER, RELEASE, AND FAILURE OF CONSIDERATION.****132. A surety will be discharged by—**

- (a) **Payment by the surety or by the principal.**
- (b) **Tender by the surety or by the principal; and such tender need not be kept good.**
- (c) **A release from the creditor or obligee to the surety or to the principal.**
- (d) **Failure of consideration.**

*Payment.*

If the contract of suretyship provides for the payment of money, payment in money or in property<sup>586</sup> by either the

<sup>583</sup> *California Sav. Bank v. American Surety Co. (C. C.)* 87 Fed. 118.

<sup>584</sup> *Jackson v. Fidelity Co.*, 75 Fed. 359, 21 C. C. A. 394. Where a bond required suit to be brought within six months after the first breach, it is sufficient if suit be brought within six months after the obligee acquires knowledge of a breach. *Novelty Mill Co. v. Heinzerling*, 39 Wash. 244, 81 Pac. 742.

<sup>585</sup> *Bean v. Chapman*, 62 Ala. 58; *PAUL v. CHRISTIE*, 4 Har. & McH. (Md.) 161.

<sup>586</sup> *Ruble v. Norman*, 7 Bush (Ky.) 582.

principal,<sup>587</sup> or by any of joint principals,<sup>588</sup> or by the surety,<sup>589</sup> is performance of the contract, and discharges the surety. Where the creditor has disposed of property of the principal given him to secure the debt, the surety can call upon the creditor for an accounting.<sup>590</sup>

*Payment by Negotiable Instrument.*

If the principal give a new note as payment, this will discharge a surety on the old debt,<sup>591</sup> unless the note be void.<sup>592</sup> Where the principal gave the creditor a check, which would have been paid if promptly presented at the bank, but which was retained by the creditor seven days, at which time it was dishonored, owing to lack of funds on deposit, a surety for the debt for which the check was given in payment was discharged.<sup>593</sup>

<sup>587</sup> Neylan v. Green, 82 Cal. 128, 23 Pac. 42; Petefish v. Watkins, 124 Ill. 384, 16 N. E. 248; Ruble v. Norman, 7 Bush (Ky.) 582; Stewart v. Levis, 42 La. Ann. 37, 6 South. 898; Burnet v. Courts, 5 Har. & J. (Md.) 78; Chapman v. Collins, 12 Cush. (Mass.) 163; Coots v. Farnsworth, 61 Mich. 497, 28 N. W. 534; Foster v. Walker, 34 Miss. 365; Manufacturers' Union Co. v. Todd, 4 Mo. App. 591; Eastman v. Plumer, 32 N. H. 239; Lancey v. Clark, 64 N. Y. 209; Savage v. Putnam, 32 N. Y. 501; Woodman v. Mooring, 14 N. C. 237; Rudolph v. Hewitt, 11 S. D. 646, 80 N. W. 133; Gibson v. Rix, 32 Vt. 824; Greening v. Patten, 51 Wis. 146, 8 N. W. 107; Kinnaird v. Webster, 10 Ch. Div. 139.

<sup>588</sup> HOLMES v. DAY, 108 Mass. 563. Payment by a joint debtor of his share does not release him as to the remainder. Sterling v. Stewart, 74 Pa. 445, 15 Am. Rep. 559.

<sup>589</sup> If, after a surety has paid the debt, judgment against the principal be reversed, he cannot recover from the creditor the amount paid. Garr v. Martin, 20 N. Y. 306.

<sup>590</sup> See ante, § 127. For a similar rule as between co-sureties, see post, c. VII, note 42.

<sup>591</sup> Morris Canal & Banking Co. v. Van Vorst, 21 N. J. Law, 100.

<sup>592</sup> The sureties are not discharged if the principal's note be void on account of usury. Mitchell v. Cotten, 2 Fla. 136. Or because ultra vires. Williams v. Gilchrist, 11 N. H. 535. In KIRBY v. LANDIS, 54 Iowa, 150, 6 N. W. 173, where the principal gave the creditor a new note with forged signatures, the sureties were held to be discharged because they were prejudiced by being led to believe that the old note had been paid; but it was said that the

<sup>593</sup> Regley v. McDonald, 80 Pa. 128; Okie v. Spencer, 1 Miles (Pa.) 290.

*Settlement by Principal for Less Than Amount Due.*

If the principal effects a settlement with the creditor for less than the amount due, the surety cannot be held for the balance;<sup>594</sup> and, if the creditor take judgment against the principal for less than the amount due, he cannot maintain a suit against the surety for the remainder of the debt.<sup>595</sup>

*Payment by Imprisonment.*

In states where imprisonment for debt is allowed, and such imprisonment is a satisfaction of the debt, a surety for the debt cannot be held during the continuance of the imprisonment of the principal.<sup>596</sup>

*Illegal Payments.*

If the payment by the principal be illegal, and the creditor is compelled to pay over the money to others, the surety will not be discharged. Thus, payment by the principal, which the creditor is obliged to give up as being a preference in violation of the bankruptcy act, will not discharge a surety;<sup>597</sup> but, in some states, it is otherwise if the creditor knows of the illegal preference.<sup>598</sup>

*Payment with Borrowed Money.*

The surety is discharged by payment, no matter by whom;<sup>599</sup> nor does it matter how the principal obtains the

sureties would have remained liable if they had not been aware of the surrender of the old note.

<sup>594</sup> Heltz v. Atlee, 67 Iowa, 483, 25 N. W. 742.

<sup>595</sup> Couch v. Waring, 9 Conn. 261.

<sup>596</sup> Koenig v. Steckel, 58 N. Y. 475. See, also, Brown v. Commonwealth, 114 Pa. 335, 6 Atl. 152. If the imprisonment of the principal does not discharge him from liability, the surety's liability is not affected. Moore v. Loring, 106 Mass. 455; Prusia v. Brown, 45 Hun (N. Y.) 80.

<sup>597</sup> Watson v. Pague, 42 Iowa, 582; Harner v. Batdorf, 35 Ohio St. 113; Hooker v. Blount (Tex. Civ. App. 1906) 97 S. W. 1083; PETTY v. COOKE (1871) L. R. 6 Q. B. 794.

<sup>598</sup> Northern Bank of Kentucky v. Cooke, 13 Bush (Ky.) 340; In re Ayers, 6 Biss. (U. S.) 48, Fed. Cas. No. 685.

<sup>599</sup> Paine v. Drury, 19 Pick. (Mass.) 400. Where a leased house was destroyed by fire, the fact that the landlord collected insurance for its full value does not affect the liability of a guarantor for the rent, as the landlord is not under any obligation to insure for the guarantor. Kingsbury v. Westfall, 61 N. Y. 356.

money. If the principal borrow the money for the purpose, this gives the lender no rights against the surety.<sup>600</sup> If a third person gives money to the principal with instructions to buy the note, but the principal pays the money to the creditor, who in good faith receives it as payment, the surety is discharged.<sup>601</sup> If a third person, at the request of the principal alone, pays the debt, he cannot recover from a surety.

*Application of Payments.*

If the principal owe the creditor two or more debts, upon one or more, but not upon all, of which sureties are liable, and the principal makes a payment less than the total indebtedness, a question may arise as to which of the debts is paid, and whether a surety has been discharged by such payment. The law gives a debtor the right, when making a partial payment, to designate upon which debt it must be applied, and the creditor is bound to respect his wishes,<sup>602</sup> although he may prefer to apply it to a different account. If the debtor request its application to a debt upon which a surety is liable, the creditor must apply it so, and thus discharge the surety, leaving unsecured debts unpaid.<sup>603</sup> If the debtor make a payment without designating any particular indebtedness upon which it is to be applied, the creditor is at liberty to apply it any time as he pleases<sup>604</sup>—on an unsecured debt if he choose, leaving the debt upon which a surety is liable unpaid.<sup>605</sup> If neither the debtor nor the creditor make application, the creditor merely giving the debtor a general credit of so much paid, and their affairs afterwards become a matter of judicial investigation, the court will apply the payment as justice and equity seem to require.<sup>606</sup>

<sup>600</sup> *Burnet v. Courts*, 5 Har. & J. (Md.) 78; *Rolfe v. Lamb*, 16 Vt. 514.

<sup>601</sup> *Eastman v. Plumer*, 32 N. H. 238.

<sup>602</sup> *Chapman v. Commonwealth*, 25 Grat. (Va.) 721.

<sup>603</sup> *Allen v. Jones*, 8 Minn. 202 (Gil. 172); *United States v. Cochran*, 2 Brock. (U. S.) 274, Fed. Cas. No. 14,821.

<sup>604</sup> *Wanamaker v. Powers* (1906, N. Y.) 79 N. E. 1118, affirming App. Div. 485, 93 N. Y. Supp. 19.

<sup>605</sup> *Stone v. Seymour*, 15 Wend. (N. Y.) 20; *Allen v. Culver*, 3 Denio (N. Y.) 285.

<sup>606</sup> *Pickering v. Day*, 2 Del. Ch. 333; *Seymour v. Van Slyck*, 8



*Application of Security.*

If the principal has given the creditor security, with instructions to apply it on an indebtedness for which a surety is liable, the surety will be discharged if it be applied otherwise,<sup>607</sup> though misapplied with the consent of the principal;<sup>608</sup> but, if the principal give collateral security generally, the creditor may apply the proceeds to any debt he sees fit.<sup>609</sup>

*Payment with Surety's Money.*

The rules as above set forth in regard to the application of payments apply to payments by the debtor with his own money; and in such cases, in the absence of any agreement, a surety cannot interfere with the respective rights of the debtor or of the creditor to make application.<sup>610</sup> But if the surety has been instrumental in raising the money for the payment of a particular debt, and this is known to the creditor, he must make application to the debt upon which such surety is liable,<sup>611</sup> although the principal may consent to a different application. Thus, where the money has been raised by the indorsement of a surety for the express purpose of enabling funds to be raised to pay off a particular debt, the money must be applied as the surety intended.<sup>612</sup>

If the debtor has applied a payment to a debt for which a surety was liable, such application cannot be changed afterwards without the consent of the surety;<sup>613</sup> and where the

Wend. (N. Y.) 403; *Stone v. Seymour*, 15 Wend. (N. Y.) 19; *Pierce v. Sweet*, 33 Pa. 151.

<sup>607</sup> *Mellendy v. Austin*, 69 Ill. 15; *Hidden v. Bishop*, 5 R. I. 29; *Baughner v. Duphorn*, 9 Gill (Md.) 314; *Rosborough v. McAlley*, 10 S. C. 235.

<sup>608</sup> *Donally v. Wilson*, 5 Leigh (Va.) 329.

<sup>609</sup> *Martin v. Pope*, 6 Ala. 532, 41 Am. Dec. 66; *Stamford Bank v. Benedict*, 15 Conn. 437; *Hanson v. Manley*, 72 Iowa, 48, 33 N. W. 357; *Fall River Nat. Bank v. Slade*, 153 Mass. 415, 26 N. E. 843, 12 L. R. A. 131; *Mathews v. Switzler*, 46 Mo. 301; *Lester v. Houston*, 101 N. C. 605, 8 S. E. 366; *Gaston v. Barney*, 11 Ohio St. 506; *North v. La Flesh*, 73 Wis. 520, 41 N. W. 633.

<sup>610</sup> *Robson v. McKoin*, 18 La. Ann. 544.

<sup>611</sup> *Bayer v. Lugar*, 106 App. Div. 522, 94 N. Y. Supp. 802.

<sup>612</sup> *HARDING v. TIFT*, 74 N. Y. 461.

<sup>613</sup> *Miller v. Montgomery*, 31 Ill. 350; *Woodman v. Mooring*, 14 N. C. 237. This rule governs, although the application has been made by mistake. *Brown v. Haggerty*, 26 Ill. 469.

right to make the application has passed to the creditor by a failure of the debtor to make any designation, and the creditor has exercised his right, he cannot be compelled afterwards to apply it otherwise. Where the creditor receives a payment in ignorance of the fact that a surety has any interest in its application, and the debtor makes no application at the time of payment, the creditor, after applying the payment to a debt other than the one for which such surety was liable, is not bound to make any change thereafter.<sup>614</sup>

*Application by Court.*

If the parties have made no application, and it must be made by the court, the latter will be governed by the circumstances of each particular case. Generally, payments on a running account will be applied to the oldest items, whether secured or not.<sup>615</sup> A payment will be applied upon a debt that is due in preference to one that is not; and, as between a secured and an unsecured debt, the application is made, generally, so as to give the creditor the best security for the indebtedness remaining unpaid.<sup>616</sup>

*Tender.*

While the general rule is that a tender, to be effective, must be kept good,<sup>617</sup> the rule does not apply in the case of a contract of suretyship.<sup>618</sup> A tender by the principal,<sup>619</sup> or by the

<sup>614</sup> *State, to Use of Buchanan County, v. Smith*, 28 Mo. 226, 72 Am. Dec. 204; *HARDING v. TIFFT*, 75 N. Y. 401.

<sup>615</sup> *Worthley v. Emerson*, 116 Mass. 374; *Frost v. Mixsell*, 38 N. J. Eq. 586; *Truscott v. King*, 6 N. Y. 147; *Hollister v. Davis*, 54 Pa. 508; *Berghaus v. Alter*, 9 Watts (Pa.) 386; *Pierce v. Knight*, 31 Vt. 701.

<sup>616</sup> *Barbee v. Morris*, 221 Ill. 382, 77 N. E. 589; *Lash v. Edgerton*, 13 Minn. 210 (Gil. 197); *Langdon v. Bowen*, 46 Vt. 512.

<sup>617</sup> *Clark*, Cont. (2d Ed.) p. 440.

<sup>618</sup> *Randol v. Tatum*, 98 Cal. 390, 33 Pac. 433; *Smith v. Loan Ass'n*, 119 N. C. 257, 26 S. E. 40. See, however, *State, to Use of Haines, v. Alden's Securities*, 12 Ohio, 59.

<sup>619</sup> *Life Ass'n of America v. Neville*, 72 Ala. 517; *Curlac v. Packard*, 29 Cal. 194; *Bonner v. Nelson*, 57 Ga. 433; *Spurgeon v. Smitha*, 114 Ind. 453, 17 N. E. 105; *Fisher v. Stockebrand*, 26 Kan. 565; *Hansford v. Perrin*, 45 Ky. (6 B. Mon.) 595; *Johnson v. Mills*, 10 Cush. (Mass.) 503; *McQuesten v. Noyes*, 6 N. H. 19; *Johnson v. Ireby*, 44 Tenn. (4 Cold.) 608, 94 Am. Dec. 206; *Watson v. Read*, 1

creditor as to the effect of the release. Where the creditor received from the principal a part of the amount due, and released him as to the remainder on account of a statement made by his agent that the surety would continue liable, the legal effect of the act would not be changed, as every one is supposed to know the law.<sup>629</sup>

*Release Obtained by Fraud.*

Where the surety is released through the fraud of the principal, the creditor, upon discovery of the fraud, will be restored to his rights against the surety, although the surety was ignorant of the fraud. Thus, where the creditor, at the suggestion of the surety, takes a mortgage from the principal, which the latter alone knows to be fictitious, and the surety is released, the rights of the creditor against the surety can be revived.<sup>630</sup>

The cancellation of a bond pursuant to law will discharge the sureties thereon;<sup>631</sup> but where the principal, who has given a bond under order of the court, has been charged with mismanagement of funds, those entitled to receive such funds acquire a vested interest in the bond, and the court has no right to release it without the consent of those so interested.<sup>632</sup>

*Release of One or More Installments.*

If the indebtedness for which a surety is bound be payable in installments, a release of the principal as to one or more installments will not affect the liability of the surety as to those installments not released.<sup>633</sup> Each installment is regarded as a separate demand. Thus, a guarantor of the payment of rent is not discharged, as to rent already due, by a surrender of the lease.<sup>634</sup>

<sup>629</sup> *Lewis v. Jones*, 4 Barn. & C. 506.

<sup>630</sup> *Scholefield v. Templer*, 4 De Gex & J. 429, affirming *John*, 155.

<sup>631</sup> *Lockwood v. Penn*, 22 La. Ann. 29.

<sup>632</sup> *Pollock v. Cox*, 108 Ga. 430, 34 S. E. 213; *Rochereau v. Jones*, 29 La. Ann. 82; *DEOBALD v. OPPERMANN*, 111 N. Y. 531, 19 N. E. 94, 2 L. R. A. 644, 7 Am. St. Rep. 760; *Commonwealth, to Use of Shaffner's Adm'r, v. Rogers*, 53 Pa. 470.

<sup>633</sup> *Coe v. Cassidy*, 72 N. Y. 133, affirming 6 Daly (N. Y.) 242; *Ducker v. Rapp*, 67 N. Y. 464.

<sup>634</sup> *KINGSBURY v. WESTFALL*, 61 N. Y. 356; *Kingsbury v. Williams*, 53 Barb. (N. Y.) 142.

*Release Will Not Discharge Indemnified Surety.*

If the surety be fully indemnified, the rule does not apply, as the surety in such a case occupies the position of a principal, and cannot be injured by the principal's release.<sup>635</sup>

*Release with Reservation of Rights Against Surety.*

The rule does not apply if the creditor, when releasing the principal, specifically reserves his remedies against the surety;<sup>636</sup> such a reservation being equivalent to a release on condition that the surety shall consent to remain bound. If the surety is compelled to pay the debt, after a release by the creditor with reservation of his rights, the surety can recover indemnity from the principal; the latter impliedly having assented thereto under the conditional release given.

*Release of Surety Discharges Supplemental Surety.*

The release of a surety will discharge a supplemental surety;<sup>637</sup> the surety occupying to the supplemental surety the relation of principal. This most frequently occurs where successive bonds have been taken in judicial proceedings, with a different set of sureties for each. Suppose suit be brought against the principal on a note signed by a surety, and judgment be recovered against the principal, who appeals without the consent of the surety. Judgment against the principal being affirmed, he takes the case to a higher court, where he also loses. At each appeal a bond has been given, with different sureties on each. The primary liability rests on the latter set,<sup>638</sup> though they all are liable to the creditor.<sup>639</sup> The

<sup>635</sup> *Moore v. Paine*, 12 Wend. (N. Y.) 123; *JONES v. WARD*, 71 Wis. 152, 36 N. W. 711.

<sup>636</sup> *Deering v. Moore*, 86 Me. 181, 29 Atl. 988, 41 Am. St. Rep. 534; *Morgan v. Smith*, 70 N. Y. 537.

<sup>637</sup> *Barnes v. Mott*, 64 N. Y. 397, 21 Am. Rep. 625; affirming 6 Daly (N. Y.) 150; *Culliford v. Walser*, 158 N. Y. 65, 52 N. E. 648, 70 Am. St. Rep. 437. As each indorser is a supplemental surety for prior indorsers, a release of any one indorser will release all those who became indorsers after the one released. *NEWCOMB v. RAY-NOR*, 21 Wend. (N. Y.) 108, 34 Am. Dec. 219.

<sup>638</sup> The primary liability rests upon the sureties in an injunction bond given to stay a judgment against the principal. *Brandenburg v. Flynn*, 12 B. Mon. (Ky.) 397.

<sup>639</sup> *Shannon v. Dodge*, 18 Colo. 164, 32 Pac. 61; *Becker v. People*, 164 Ill. 267, 45 N. E. 500; *Coonradt v. Campbell*, 29 Kan. 391; *Boaz*

original surety on the note occupies the position of a supplemental surety; and, upon payment of the debt to the creditor, he will be entitled to the benefits of either appeal bond. The sureties upon the first appeal bond, if compelled to make payment, can have redress against the sureties upon the last appeal bond; the sureties on the first bond occupying the position of supplemental sureties to those on the last bond. Each time a bond has been given, it has tied the hands of those liable to the creditor, and has postponed their right of subrogation, by substituting a new set of persons liable to the creditor.<sup>640</sup> The sureties in each bond, when given, interfered with the rights of preceding sureties. They secured a delay by promising to pay the judgment, and this delay might be prejudicial to those already liable.<sup>641</sup> It results from this that a release of the last set of sureties would release all the other sureties.<sup>642</sup>

#### *Release of Co-Surety.*

The release<sup>643</sup> of one co-surety by the creditor will release the others to the extent that the released surety was equitably bound.<sup>644</sup> If, however, the creditor reserves his rights against

v. Milliken, 4 Ky. Law Rep. 700; CHESTER v. BRODERICK, 131 N. Y. 549, 30 N. E. 507; Church v. Simmons, 88 N. Y. 261; Moore v. Lassiter, 16 Lea (Tenn.) 630; Howard Ins. Co. v. Silverberg (C. C.) 89 Fed. 168.

<sup>640</sup> Hinckley v. Kreltz, 58 N. Y. 583.

<sup>641</sup> Pott v. Nathans, 1 Watts & S. (Pa.) 155, 37 Am. Dec. 453.

<sup>642</sup> Lewis v. Armstrong, 47 Ga. 289; Culliford v. Walser, 158 N. Y. 65, 52 N. E. 648, 70 Am. St. Rep. 437; Hinckley v. Kreltz, 58 N. Y. 583.

<sup>643</sup> A release of a co-surety, without consideration, not being a binding agreement, does not affect the others. CITY OF DEERING v. MOORE, 86 Me. 181, 20 Atl. 988, 41 Am. St. Rep. 534.

<sup>644</sup> Jemison v. Governor, 47 Ala. 390; Lewis v. Armstrong, 80 Ga. 402, 7 S. E. 114; Thompson v. Adams, Freem. Ch. (Miss.) 225; Morgan v. Smith, 70 N. Y. 537; Wanamaker v. Powers (N. Y. 1906) 79 N. E. 1118, affirming 102 App. Div. 485, 93 N. Y. Supp. 19; Schock v. Miller, 10 Pa. (10 Barr) 401; Waggener v. Dyer, 11 Leigh (Va.) 384. See, also, Gordon v. Moore, 44 Ark. 349, 51 Am. Rep. 606; Smith v. State, 46 Md. 617; State ex rel. Midgett v. Matson, 44 Mo. 305; Massey v. Brown, 4 S. C. 85. This is regulated by statute in some states. State, to Use of Southern Bank, v. Atherton, 40 Mo.

the remaining co-sureties, it is a conditional release, and does not affect the creditor's rights.<sup>646</sup> It is equivalent to a release on condition that the others will remain bound for the full amount, and gives implied assent, on the part of the one released, to be liable to his co-sureties for his proportionate share, if they pay the debt and desire to hold him.

*Release of Surety Does not Affect Principal's Liability.*

A release of the surety by the creditor will discharge him, but will have no effect upon the liability of the principal,<sup>647</sup> although after judgment,<sup>648</sup> as the discharge of the surety is nothing more than the principal himself was bound to effect,<sup>649</sup> and no injustice is done him.<sup>650</sup> The surety is not bound to indemnify him.

This is clear in the case of a surety in the narrow sense, but the confusion arises in cases of suretyship by operation of law.<sup>651</sup> As the grantee of lands, who has assumed the mortgage debt, is primarily liable,<sup>652</sup> and the mortgagor becomes a surety for the debt, the creditor can release the mortgagor without affecting the liability of the grantee.<sup>653</sup>

209; *Alford v. Baxter*, 36 Vt. 158. The proportionate amount to which a co-surety is released by the release of another is determined by the solvency of the co-sureties. *DODD v. WINN*, 27 Mo. 501. If a surety is bound jointly with others, an unqualified release of one will discharge all at law. *Spencer v. Houghton*, 68 Cal. 82, 8 Pac. 679; *Clark v. Mallory*, 185 Ill. 227, 56 N. E. 1099. And see *Ward v. National Bank*, 8 App. Cas. 755.

<sup>646</sup> *Hood v. Hayward*, 124 N. Y. 1, 26 N. E. 331; *Glasscock v. Hamilton*, 62 Tex. 143; *Hewitt's Adm'r v. Adams*, 1 Pat. & H. (Va.) 34; *THOMPSON v. LACK*, 3 C. B. 540; *Macdonald v. Whitfield*, 27 Can. 94.

<sup>647</sup> *Union-Nat. Bank v. Legendre*, 35 La. Ann. 787; *Wolf v. Fink*, 1 Pa. (1 Barr) 435, 44 Am. Dec. 141; *McIlhenny v. Blum*, 68 Tex. 197, 4 S. W. 367.

<sup>648</sup> *Mortland v. Himes*, 8 Pa. (8 Barr) 265; *Ragsdale v. Gossett*, 70 Tenn. (2 Lea) 729. And see ante, § 101.

<sup>649</sup> *Carroll v. Corbitt*, 57 Ala. 579; *Burson v. Kincaid*, 3 Pen. & W. (Pa.) 57.

<sup>650</sup> *Fewlass v. Abbott*, 28 Mich. 270.

<sup>651</sup> See ante, § 68.

<sup>652</sup> See ante, § 18, (a), (2).

<sup>653</sup> *Bentley v. Vanderheyden*, 35 N. Y. 677; *Tripp v. Vincent*, 3 Barb. Ch. (N. Y.) 613; *Richmond v. Aiken*, 25 Vt. 324.

*Failure of Consideration.*

As a surety would not be bound by a want of consideration for his contract,<sup>653</sup> so he is discharged by a failure of consideration.<sup>654</sup> Thus, where a person assumes liability on consideration that the creditor will discontinue a suit brought against the principal, such person will be discharged if the creditor proceed with the suit.<sup>655</sup> This defense, however, cannot be set up against the holder of a negotiable instrument who has acquired the same for value without notice.<sup>656</sup>

**LIABILITY OF SURETY ON CONTRACT ENTERED INTO  
BY PRINCIPAL UNDER DURESS, OR THROUGH  
FRAUD, OR IF ILLEGAL.**

**133. A surety will not be bound if the principal executed the contract under duress, unless the surety signed with knowledge thereof; nor will a surety be bound if the principal was induced to enter into his contract through the fraud of the creditor; or if the principal's contract be illegal.**

*Duress of Principal.*

While duress of the surety would be a good defense to him,<sup>657</sup> it is not, generally, a sufficient defense for the surety that the principal was under duress,<sup>658</sup> unless the surety exe-

<sup>653</sup> Ante, § 49.

<sup>654</sup> *Harney v. Laurie*, 13 Ill. App. 400; *Walter A. Wood Mowing & Reaping Mach. Co. v. Land*, 98 Ky. 516, 32 S. W. 607; *BAKER v. KENNETT*, 54 Mo. 82; *SAWYER v. CHAMBERS*, 43 Barb. (N. Y.) 622; *Gunnls v. Weigley*, 114 Pa. 191, 6 Atl. 465; *Carroll County Sav. Bank v. Strother*, 28 S. C. 504, 6 S. E. 313; *Cooper v. Joel*, 1 De G., F. & J. 240. Where a bank takes a note signed by sureties, and knows that the proceeds are wanted for a particular purpose, the sureties will not be liable for any portion appropriated to any other purpose. *Planters' State Bank v. Schlamp* (Ky. 1907) 99 S. W. 216.

<sup>655</sup> *Bookstaver v. Jayne*, 60 N. Y. 146.

<sup>656</sup> *Stone v. Bond*, 2 Heisk. (Tenn.) 425; *Norton, Bills and Notes* (3d Ed.) p. 276.

<sup>657</sup> Ante, § 55.

<sup>658</sup> *Haney v. People*, 12 Colo. 345, 21 Pac. 89; *Spicer v. State*, 9 Ga. 49; *Peacock v. People*, 83 Ill. 331; *Huggins v. People*, 39 Ill. 241; *Tucker v. State*, 72 Ind. 242; *Thompson v. Buckhannon*, 25 Ky. (2 J. J. Marsh.) 416; *Oak v. Dustin*, 79 Me. 23, 7 Atl. 815, 1 Am.

cuted the contract in ignorance thereof.<sup>600</sup> If the surety is aware of the duress, it might be said that he consented to be bound notwithstanding the principal's lack of liability; but to hold him liable where he was ignorant of the duress either would be taking away his right of indemnity against the principal, upon which he might have relied, or, if given the right to recover from his principal, it would be making the principal indirectly liable when he could not be proceeded against directly, thus allowing the wrongdoer to take advantage of his own wrong.<sup>601</sup>

*Surety Not Liable if Contract Entered into by Principal through Fraud.*

If the principal is not bound, owing to fraud practiced upon him by the creditor, the surety, likewise, is not bound.<sup>602</sup> Where a contract of sale of a patent right was entered into, and a third person deposited a government bond with the seller to secure the purchase price, upon repudiation of the sale by the buyer on account of fraud, the owner of the bond could recover the amount of the bond from the seller.<sup>603</sup>

*Illegality of Principal's Contract is a Defense to the Surety.*

If the principal's contract is illegal, the surety is not liable.<sup>604</sup>

St. Rep. 281; *Harris v. Carmody*, 131 Mass. 51, 41 Am. Rep. 188; *Robinson v. Gould*, 11 Cush. (Mass.) 55; *Simms v. Barefoot's Ex'rs*, 3 N. C. 402; *HAZARD v. GRISWOLD* (C. C.) 21 Fed. 178; *Huscombe v. Standing Co.*, Cro. Jac. 187; 40 Cent. Dig. col. 1649.

<sup>600</sup> *GRIFFITH v. SITGREAVES*, 90 Pa. 161. In *Patterson v. Gibson*, 81 Ga. 802, 10 S. E. 9, 12 Am. St. Rep. 356, it is said that knowledge of facts constituting duress (in this case, illegal imprisonment) is not knowledge of duress.

<sup>601</sup> *Owens v. Mynatt*, 1 Helsk. (Tenn.) 675.

<sup>602</sup> *Bennett v. Corey*, 72 Iowa, 476, 34 N. W. 291; *Hazard v. Irwin*, 35 Mass. (18 Pick.) 95; *PUTNAM v. SCHUYLER*, 4 Hun (N. Y.) 166, 6 Thomp. & C. 485; *Coleman v. Waller*, 3 Younge & J. 212. As to the effect of fraud practiced upon the surety, see ante, § 54.

<sup>603</sup> *Wile v. Wright*, 32 Iowa, 451.

<sup>604</sup> *State v. Brantley*, 27 Ala. 44; *Ferry v. Burchard*, 21 Conn. 597; *Shuttleworth v. Levi*, 13 Bush (Ky.) 195; *Aucoin v. Guillot*, 10 La. Ann. 124; *Fisher v. Shattuck*, 17 Pick. (Mass.) 252; *Crum v. Wilson*, 61 Miss. 223; *SWIFT v. BEERS*, 3 Denio (N. Y.) 70; *Thompson v. Lockwood*, 15 Johns. (N. Y.) 256; *Gill v. Morris*, 11 Helsk. (Tenn.)



**WAIVER OF DEFENSES.**

**134. A surety may waive his defenses. If a surety, with full knowledge of facts which would discharge him, pay the debt, he cannot recover the money so paid.**

While a surety may take advantage of certain acts of the creditor and insist upon being discharged, he is not compelled to do so. If, with full knowledge of the facts which would constitute a valid defense, he pays the debt,<sup>614</sup> or acknowledges his liability,<sup>615</sup> he afterwards cannot avail himself of the defense, although he acted in ignorance of the legal effect of the creditor's acts.

**WHO CAN ENFORCE SURETY'S CONTRACT.**

**135. A surety cannot be held liable by any one to whom he did not intend to assume liability, as indicated by his contract.**

*Who Can Enforce Liability on Bonds.*

A contract of suretyship can be enforced by those only who are parties to it,<sup>616</sup> or for whose benefit it was entered

614, 27 Am. Rep. 744; *United States v. Tingey*, 5 Pet. (U. S.) 115, 8 L. Ed. 66. See ante, § 56.

<sup>614</sup> This is so, although a decision against the principal is reversed afterwards on appeal. *Garr v. Martin*, 20 N. Y. 306.

<sup>615</sup> *Churchill v. Bradley*, 58 Vt. 403, 5 Atl. 189, 56 Am. Rep. 563.

<sup>616</sup> *Inhabitants of Farmington v. Hobert*, 74 Me. 416; *Flynn v. Insurance Co.*, 115 Mass. 449; *Huntington v. Knox*, 7 Cush. (Mass.) 374; *Loeb v. Barris*, 50 N. J. Law, 382, 13 Atl. 602; *Henricus v. Englert*, 137 N. Y. 488, 33 N. E. 550; *Woonsocket Rubber Co. v. Banigan*, 21 R. I. 146, 42 Atl. 512. A bond to save the owner of a building harmless from liens cannot be enforced by the lienholders. *Stetson & Post Mill Co. v. McDonald*, 5 Wash. 496, 32 Pac. 108. Nor are the sureties for a contractor liable for the debts of a subcontractor. *State ex rel. Price v. Hinsdale-Doyle Co.*, 117 Ind. 476, 20 N. E. 437; *McCluskey v. Cromwell*, 11 N. Y. 593. Or for materials furnished. *Electric Appliance Co. v. United States Fidelity Co.*, 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 609. A bond to one person cannot be enforced by that person and his partner. *Barnett v. Smith*, 17 Ill. 565. And a bond to two or more cannot be enforced

into.<sup>667</sup> If the contract be in the form of a bond, an action thereon must be in the name of the obligee. If the bond be given by a public officer for the benefit of the public, the action will be in the name of the obligee<sup>668</sup> "for the use of" the person injured; but a surety on the bond cannot bring an action thereon.<sup>669</sup> If, by reason of default of a deputy sheriff, the sureties of the sheriff are compelled to pay, they can recover from the deputy's sureties.<sup>670</sup>

If the obligee be deceased, his personal representative can sue upon the bond;<sup>671</sup> but not as to defaults occurring after the obligee's death.<sup>672</sup>

If a bond be given to the directors of a company elected annually, such directors can bring an action after they have ceased to be directors,<sup>673</sup> and have ceased to have any interest; but, if the obligees in a bond become incorporated, the bond cannot be enforced by the corporation, as the corporation is a different person.<sup>674</sup>

*Who Can Enforce Payment of Promissory Notes.*

A surety on a negotiable promissory note payable to a particular person cannot be held liable by another person who discounts the note, instead of the payee, although the surety

by fewer than all. *Phillips v. Poole*, 96 Ga. 515, 23 S. E. 504; *Phillips v. Singer Co.*, 88 Ill. 305; *Burns v. Follansbee*, 20 Ill. App. 41; *Sims v. Harris*, 47 Ky. 55; *Wallis v. Dilley*, 7 Md. 237; *Dana v. Parker (C. C.)* 27 Fed. 263; *Bradburne v. Botfield*, 14 M. & W. 559. And see ante, § 117.

<sup>667</sup> *People v. Chalmers*, 60 N. Y. 154; *GRIFFITH v. RUNDLE*, 23 Wash. 453, 63 Pac. 199, 55 L. R. A. 381. A bond conditioned to save the "president and directors of the bank" harmless will be construed to save the corporation harmless. *New Orleans Nat. Bank v. Wells*, 28 La. Ann. 736, 26 Am. Rep. 107; *Bayley v. Insurance Co.*, 6 Hill (N. Y.) 476, 41 Am. Dec. 759. One who was not bound by a writ of injunction cannot recover on the injunction bond. *Marengo County v. Matkin* (Ala. 1905) 42 South. 33.

<sup>668</sup> *People v. Bugbee*, 1 Idaho, 96; *State, to Use of Oregon County, v. Thomas*, 17 Mo. 503; *Branch v. Elliot*, 14 N. C. 86.

<sup>669</sup> *Mitchell v. Turner*, 37 Ala. 660.

<sup>670</sup> *Brinson v. Thomas*, 55 N. C. 414.

<sup>671</sup> *Young v. Patterson*, 165 Pa. 423, 30 Atl. 1011.

<sup>672</sup> *Barker v. Parker*, 1 Durn. & E. 287. See ante, § 118.

<sup>673</sup> *Anderson v. Longden*, 1 Wheat. (U. S.) 85, 4 L. Ed. 42.

<sup>674</sup> *Bensinger v. Wren*, 100 Pa. 500.

may not be harmed.<sup>675</sup> A surety has the right to determine with whom he will contract.

*Who can Enforce Special Guaranties.*

If a special guaranty addressed to one person be acted upon by another, the latter cannot hold the guarantor,<sup>676</sup> even though the addressee be the agent of the one who acts upon it.<sup>677</sup> A special guaranty implies trust and confidence in the prudence and discretion of the addressee, and it cannot be assigned, although, after a right of action has arisen through a breach, such right of action is assignable.<sup>678</sup> A person will not be permitted to show that a guaranty was intended for him, but by mistake was addressed to another.<sup>679</sup>

If a guaranty be addressed to an individual, it cannot be acted upon by two or more;<sup>680</sup> and, if addressed to two or

<sup>675</sup> *Planters' & Merchants' Bank v. Blair*, 4 Ala. 613; *Russell v. Ballard*, 16 B. Mon. (Ky.) 201, 63 Am. Dec. 526; *Manufacturers' Bank v. Cole*, 39 Me. 188; *Bank of Newbury v. Richards*, 35 Vt. 281.

<sup>676</sup> *McCollum v. Cushing*, 22 Ark. 540; *Potter v. Gronbeck*, 117 Ill. 404, 7 N. E. 586; *Second Nat. Bank of Peoria v. Diefendorf*, 90 Ill. 396; *Mitchell v. Rallton*, 45 Mo. App. 273; *EVANSVILLE NAT. BANK v. KAUFFMANN*, 93 N. Y. 273, 45 Am. Rep. 204; *Birckhead v. Brown*, 5 Hill (N. Y.) 634; *Halloway v. Blum*, 60 Tex. 625; *Wilson v. Childress*, 2 Wilson, Civ. Cas. Ct. App. § 425; *Edmondston v. Drake*, 30 U. S. (5 Pet.) 624, 8 L. Ed. 251; *Barker v. Parker*, 1 Term R. 287. It is not necessary that a special letter of credit expressly state that it is intended for the addressee only. *TAYLOR v. WETMORE*, 10 Ohio, 491. In *City Nat. Bank of Poughkeepsie v. Phelps*, 16 Hun, 158, it was held that a letter of credit addressed to "City Bank, Poughkeepsie, N. Y.," could be acted upon by the "City National Bank of Poughkeepsie"; the addressee being originally a state bank, subsequently changed to a national bank, with a change in name.

<sup>677</sup> *Second Nat. Bank of Peoria v. Diefendorf*, 90 Ill. 396. In *Michigan State Bank v. Peck*, 28 Vt. 200, 65 Am. Dec. 234, it was held that a letter of credit addressed to "C. O. Trowbridge, President, Detroit, Mich.," could be acted upon by the Michigan State Bank; Trowbridge being president of that bank, and not the president of any other institution.

<sup>678</sup> *EVANSVILLE NAT. BANK v. KAUFFMANN*, 93 N. Y. 273, 45 Am. Rep. 204; *Robbins v. Bingham*, 4 Johns. (N. Y.) 476.

<sup>679</sup> *Taylor v. McClung*, 2 Houst. (Del.) 24; *Grant v. Naylor*, 4 Cranch (U. S.) 224, 2 L. Ed. 222.

<sup>680</sup> *Sollee v. Meagy*, 1 Bailey (S. C.) 620; *Allison v. Rutledge*, 5 Yerg. (Tenn.) 193.

more, it cannot be acted upon by any number less than all.<sup>681</sup> If a guaranty be addressed to one person, it cannot be acted on by a firm of which he is a member;<sup>682</sup> nor can a guaranty addressed to a firm be acted upon by a member of the firm. A letter addressed to a firm which is no longer in existence cannot be acted upon by a former member of the firm,<sup>683</sup> even though the name of that partner alone appears upon an address upon the back of the guaranty;<sup>684</sup> nor does it make any difference that the dissolution was occasioned by the death of a partner.<sup>685</sup> Where two partnerships, composed of the same members, had different names, and were in different parts of the same city, a guaranty addressed to one firm name could not be acted upon by the other.<sup>686</sup> Each might have had a different manner of conducting its business.

*When Contract May Be Enforced by Other Than the Original Parties.*

If a contract of suretyship show an intention that others may act upon it, the sureties remain liable.<sup>687</sup> Thus, where the sureties regard a partnership more as a house than as a number of individuals, they may be held after a new partner has been taken into the firm.<sup>688</sup>

*General Guaranties.*

A general guaranty, addressed to all persons, can be acted upon by any one.<sup>689</sup> A guaranty which is addressed to the

<sup>681</sup> Ante, § 117.

<sup>682</sup> Sollee v. Meugy, 1 Bailey (S. C.) 620.

<sup>683</sup> Schoonover v. Osborne, 108 Iowa, 453, 79 N. W. 263; Penoyer v. Watson, 18 Johns. (N. Y.) 100.

<sup>684</sup> Smith v. Montgomery, 8 Tex. 199.

<sup>685</sup> Cosgrave Brewing Co. v. Starrs, 5 Ont. 189.

<sup>686</sup> Taylor v. McClung, 2 Houst. (Del.) 24.

<sup>687</sup> Ketchell v. Burns, 24 Wend. (N. Y.) 456; Wadsworth v. Allen, 8 Grat. (Va.) 174, 56 Am. Dec. 137.

<sup>688</sup> Barclay v. Lucas, 1 Durn. & E. 291, note, 3 Doug. 321.

<sup>689</sup> Lemmon v. Strong, 59 Conn. 448, 22 Atl. 293, 12 L. R. A. 270, 21 Am. St. Rep. 123; Ellsworth v. Harmon, 101 Ill. 274; Commercial Bank v. Provident Inst., 59 Kan. 361, 53 Pac. 131, 41 L. R. A. 175, 68 Am. St. Rep. 368; Harbord v. Cooper, 43 Minn. 466, 45 N. W. 960; State Nat. Bank v. Haylen, 14 Neb. 480, 16 N. W. 754; UNION BANK OF LOUISIANA v. COSTER, 3 N. Y. (3 Comst.) 203, 53 Am. Dec. 280, affirming 3 N. Y. Super. Ct. (1 Sandf.) 563; Birekhead v.

principal himself, or to no one in particular, is a general guaranty.<sup>600</sup>

*Guaranties of Negotiable Instruments.*

Where the instrument whose payment is guaranteed is a negotiable one, and the guaranty is written thereon, an intention generally is shown to extend the benefit of the guaranty to any subsequent holder of the instrument;<sup>601</sup> and where a negotiable instrument is covered by a general guaranty, a transferee of the instrument is entitled to the benefit of the guaranty, although he is in ignorance of its existence at the time of the transfer.<sup>602</sup>

**ESTOPPEL OF SURETY—VALIDITY OF CONTRACT SECURED.**

**136. Where a contract of suretyship is entered into to secure the performance of another contract, the surety is estopped to deny that such other contract was a binding obligation, unless fraud or illegality can be shown.**

Brown, 5 Hill (N. Y.) 634, affirmed 2 Denio (N. Y.) 375; Partridge v. Davis, 20 Vt. 499; Tidioute Sav. Bank v. Libbey, 101 Wis. 193, 77 N. W. 182, 70 Am. St. Rep. 907; Carpenter v. Longan, 16 Wall. (U. S.) 271, 21 L. Ed. 313. And see ante, § 29.

<sup>600</sup> Lowry v. Adams, 22 Vt. 160.

<sup>601</sup> Killian v. Ashley, 24 Ark. 511, 91 Am. Dec. 519; Hopson v. Ætna Axle Co., 50 Conn. 597; Ellsworth v. Harmon, 101 Ill. 274; Judson v. Gookwin, 37 Ill. 286; Jones v. Berryhill, 25 Iowa, 289; Commercial Bank v. Provident Inst., 59 Kan. 361, 53 Pac. 131, 41 L. R. A. 175, 68 Am. St. Rep. 368; Harbord v. Cooper, 43 Minn. 466, 45 N. W. 860; Cross v. Rowe, 22 N. H. 77; Everson v. Gere, 122 N. Y. 290, 25 N. E. 492, affirming 40 Hun (N. Y.) 248; Levy v. Cohen, 103 App. Div. 195, 92 N. Y. Supp. 1074, reversing 45 Misc. Rep. 95, 91 N. Y. Supp. 594; Bank of Ashland v. Jones, 16 Ohio St. 145; Northumberland County Bank v. Eyer, 58 Pa. 97; Reed v. Garvin, 12 Serg. & R. (Pa.) 100; Partridge v. Davis, 20 Vt. 499; Arents v. Commonwealth, 18 Grat. (Va.) 750. Contra, Bray v. Marsh, 75 Me. 452, 46 Am. Rep. 416; True v. Fuller, 38 Mass. (21 Pick.) 140; Taylor v. Binney, 7 Mass. 479; Tinker v. McCauley, 3 Mich. 188; Hayden v. Weldon, 43 N. J. Law (14 Vroom) 128, 39 Am. Rep. 551; Smith v. Dickinson, 6 Humph. (Tenn.) 261, 44 Am. Dec. 306.

<sup>602</sup> Tidioute Sav. Bank v. Libbey, 101 Wis. 193, 77 N. W. 182, 70 Am. St. Rep. 907.

**SAME—RECITALS IN OBLIGATION.**

137. A surety is estopped to deny the facts recited in his obligation.

**SAME—ELECTION OR APPOINTMENT OF OFFICER.**

138. A surety for an officer is estopped to deny the validity of his election or appointment.

**SAME—JURISDICTION OF COURT.**

139. A surety on a bond given in a judicial proceeding is estopped to deny the jurisdiction of the court in which the bond was given.

**SAME—EXISTENCE OF CORPORATION OR PARTNERSHIP.**

140. A surety on a bond given to a corporation, or to a partnership, is estopped to deny its legal existence.

**SAME—ENFORCEMENT OF RIGHTS.**

141. A surety may be estopped, by his words or conduct, from claiming the rights of a surety.

*Surety Estopped to Show Contract Defective.*

While, as has been shown, a surety successfully may set up fraud, duress, or illegality as a defense, when sued upon his contract, whether such fraud, duress, or illegality entered into the contract of suretyship,<sup>\*\*\*</sup> or into the contract of the principal,<sup>\*\*\*</sup> he is not allowed to show that the contract of the principal, which he has intended to secure, is invalid, because defective.<sup>\*\*\*</sup> After he has been instrumental, by his undertaking, in procuring for his principal all the advantages

<sup>\*\*\*</sup> See ante, §§ 54-56.

<sup>\*\*\*</sup> See ante, § 133.

<sup>\*\*\*</sup> Kean v. McKinsey, 2 Pa. (2 Barr) 30.

*Surety Estopped to Deny Jurisdiction.*

Where a bond has been given in the course of judicial proceedings, sureties thereon cannot deny the jurisdiction of the court in which the bond was given.<sup>708</sup> These matters should be contested otherwise.

*Surety Estopped to Deny Validity of Incorporation or Partnership.*

Sureties on bonds given to corporations or to partnerships are estopped to deny the legal existence of the obligees.<sup>709</sup>

*Surety Estopped to Deny Capacity in Which He Acts.*

Sureties are estopped, sometimes, by their words or acts, from claiming the rights which they otherwise would possess. If a person expressly agrees to be bound as a principal, he cannot assert that he is a surety,<sup>710</sup> although that fact be known to the creditor.<sup>711</sup> While the law gives certain privileges to a surety, he has the right to waive them, if he choose to do so,<sup>712</sup> either in his contract or afterwards. Thus, where a note reads, "We jointly and severally, all as principals, promise to pay," none of the signers can show that he was a surety only.<sup>713</sup> If the note had been silent as to the exact relation borne by the signers, and this was known to the holder, oral

<sup>708</sup> Norton v. Miller, 25 Ark. 108; Fahnestock v. Gilham, 77 Ill. 637; Pritchett v. People, 6 Ill. 525; Harbaugh v. Albertson, 102 Ind. 69, 1 N. E. 298; In re McConomy's Estate, 170 Pa. 140, 32 Atl. 608; Behrens v. Rodenburg, 1 City Ct. R. (N. Y.) 93; Pannill's Adm'r v. Calloway, 78 Va. 387.

<sup>709</sup> Fort Wayne & B. Turnpike Co. v. Deam, 10 Ind. 563; Teutonia Nat. Bank v. Wagner, 33 La. Ann. 732; Father Matthew Young Men's Total Abstinence & Benevolent Soc. v. Fitzwilliams, 84 Mo. 406, affirming 12 Mo. App. 445; White v. Coventry, 29 Barb. (N. Y.) 305; Trumbull County Mut. Fire Ins. Co. v. Horner, 17 Ohio, 407; Singer Mfg. Co. v. Bennett, 28 W. Va. 16.

<sup>710</sup> Yates v. Donaldson, 5 Md. 389, 61 Am. Dec. 283; McMillan v. Parkell, 64 Mo. 286; Exeter Bank v. Stowell, 16 N. H. 61, 41 Am. Dec. 716; Perkins v. Goodman, 21 Barb. (N. Y.) 218; Ennis v. Crump, 6 Tex. 85; Dart v. Sherwood, 7 Wis. 523, 76 Am. Dec. 228; Sprigg v. Bank, 14 Pet. (U. S.) 201, 10 L. Ed. 419.

<sup>711</sup> Waterville Bank v. Redington, 52 Me. 466; President of Claremont Bank v. Wood, 10 Vt. 582.

<sup>712</sup> Picot v. Signiago, 22 Mo. 587.

<sup>713</sup> Heath v. Derry Bank, 44 N. H. 174; Derry Bank v. Baldwin, 41 N. H. 434.

evidence could be offered; for that would not be contradicting the terms of the note.<sup>714</sup> The same result is accomplished by the surety writing the word "principal" after his signature.<sup>715</sup> The right of the creditor not to be compelled to recognize the privileges of a surety is sometimes very important, and the creditor can insist upon the surety performing his contract in the capacity assumed in his written agreement.

Where a surety for some time has conducted himself as a principal, he will be estopped from afterwards claiming the rights of a surety.<sup>716</sup>

**SURETY DISCHARGED BY CREDITOR PROMISING TO LOOK TO PRINCIPAL.**

**142. Where the creditor, after maturity of the debt, tells the surety that he will look to the principal alone for payment, and the surety relies on such statement, the surety will be discharged.**

**SURETY DISCHARGED BY CREDITOR'S INFORMATION THAT DEBT HAS BEEN PAID.**

**143. If the creditor tell the surety that the debt has been paid, and the latter, in consequence, changes his situation as to the principal, the surety will be discharged, although the creditor honestly was mistaken.**

*Surety Looking to Principal Alone.*

If, after maturity of the debt, the creditor tell a surety therefor that he will look to the principal alone, and the surety is lulled into security, taking no steps to protect himself as against the principal and dismissing the matter from his mind, he will be discharged.<sup>717</sup> However, the mere expression of opinion by the creditor that the principal is responsible, and

<sup>714</sup> Ante, § 104.

<sup>715</sup> *Menaugh v. Chandler*, 89 Ind. 94; *Sprigg v. Bank*, 10 Pet. (U. S.) 257, 9 L. Ed. 416.

<sup>716</sup> *In re Goswiler's Estate*, 3 Pen. & W. (Pa.) 200.

<sup>717</sup> *Wolf v. Madden*, 82 Iowa, 114, 47 N. W. 981; *Harris v. Brooks*, 21 Pick. (Mass.) 195, 32 Am. Dec. 254; *West v. Brison*, 99 Mo. 684, 13 S. W. 95; *Harmon v. Hale*, 1 Wash. T. 422, 34 Am. Rep. 816.



will pay without the surety being called upon, is not sufficient to discharge the latter,<sup>718</sup> especially if there is no evidence that the surety relied upon such statement or has been injured thereby.

*Creditor Telling Surety that Debt is Paid.*

If the creditor notify the surety that the debt has been paid, and the surety thereupon surrenders securities, the surety is discharged,<sup>719</sup> although the creditor was mistaken,<sup>720</sup> and made his statement without fraudulent design; but it is otherwise if the surety is not injured by the creditor's acts.<sup>721</sup>

**EXTENT OF SURETY'S LIABILITY FOR BREACH OF BOND.**

**144. A surety on a bond is liable for all direct damages resulting from its breach, not exceeding the amount named therein, with interest and costs, unless he has enlarged or restricted his liability.**

**SURETY FOR A DEBT LIABLE FOR INTEREST THEREON.**

**145. A surety for a debt is liable for interest thereon.**

**SURETY LIABLE FOR NECESSARY EXPENSES INCURRED BY CREDITOR OR OBLIGEE.**

**146. A surety is liable for necessary expenses incurred by the creditor or obligee, if accessory to the contract.**

<sup>718</sup> Michigan State Ins. Co. v. Soule, 51 Mich. 312, 16 N. W. 662; Howe Machine Co. v. Farrington, 82 N. Y. 121; Brubaker v. Okeson, 36 Pa. 519.

<sup>719</sup> Waters v. Creagh, 4 Stew. & P. (Ala.) 410; High v. Cox, 55 Ga. 662; Thornburgh v. Madren, 33 Iowa, 380; Brooking v. Farmers' Bank, 83 Ky. 431; Roberts v. Miles, 12 Mich. 297; Cochecho Nat. Bank v. Haskell, 51 N. H. 116, 12 Am. Rep. 68.

<sup>720</sup> Whitaker v. Kirby, 54 Ga. 277; Baker v. Briggs, 8 Pick. (Mass.) 122, 19 Am. Dec. 311.

<sup>721</sup> Driskell v. Mateer, 31 Mo. 325, 80 Am. Dec. 105; Barney v. Clark, 46 N. H. 514.

**LIQUIDATED DAMAGES AND PENALTIES.**

**147. A surety is liable for liquidated damages, but not for penalties.**

*Surety Liable for Such Damages as Naturally Result from Breach of Bond.*

All damages which result from a breach of a bond can be recovered from a surety thereon, provided they result directly from the breach.<sup>722</sup> A surety on an appeal bond in a suit which affects real estate cannot be held for the amount of the rents and profits pending appeal;<sup>723</sup> nor, in any case, can sureties be compelled to pay more than the penalty named in the bond,<sup>724</sup> though, in the absence of any restriction, each surety is liable to that amount.<sup>725</sup>

It is the practice to give judgment against the sureties jointly for the full amount of the penalty,<sup>726</sup> and then assess the actual damages as found by the jury. If subsequent breaches of the bond are shown, additional damages are assessed for each breach, to be paid from the judgment already entered. When the subsequent assessments of damages have reached the amount of the penalty, and have been paid by any one or more of the sureties, no surety can be held further responsible.<sup>727</sup>

<sup>722</sup> *Cummings v. Mugge*, 94 Ill. 186; *Miles v. Davis*, 36 Tex. 690.

<sup>723</sup> *Opp v. Ward*, 125 Ind. 241, 24 N. E. 974, 21 Am. St. Rep. 220.

<sup>724</sup> *Johnson v. McMillan*, 13 Colo. 423, 22 Pac. 769; *Gray v. Cook*, 3 Houst. (Del.) 49; *Westbrook v. Moore*, 59 Ga. 204; *Meadows v. State*, 114 Ind. 537, 17 N. E. 121; *Stull v. Lee*, 70 Iowa, 31, 30 N. W. 6; *Fraser v. Little*, 13 Mich. 195, 87 Am. Dec. 741; *Showles v. Freeman*, 81 Mo. 540; *Tunison v. Cramer*, 5 N. J. Law (2 Southard) 498; *Wood v. Fisk*, 63 N. Y. 245, 20 Am. Rep. 528; *Rayner v. Clark*, 7 Barb. (N. Y.) 581; *Anthony v. Estes*, 101 N. C. 541, 8 S. E. 347; *Delo v. Banks*, 101 Pa. 458; *Commonwealth v. Forney*, 3 Watts & S. (Pa.) 353; *Farrar v. United States*, 5 Pet. (U. S.) 373, 8 L. Ed. 159.

<sup>725</sup> *CHESTER v. BRODERICK*, 131 N. Y. 549, 30 N. E. 507.

<sup>726</sup> *Turner v. Sisson*, 137 Mass. 191.

<sup>727</sup> *Leggett v. Humphreys*, 21 How. 66, 16 L. Ed. 50.

*Liability for Interest on Damages for Breach of Bond.*

Unless otherwise provided, a surety is liable for interest at the legal rate from the time his liability for a breach begins,<sup>728</sup> which is usually not the time of the breach, but from the time of demand for payment,<sup>729</sup> unless there is a duty to pay without demand.<sup>730</sup> The beginning of a suit is a sufficient demand.<sup>731</sup> A surety is liable for interest up to the time of judgment, although the amount allowed for interest swells the total damages above the amount of the penalty in the bond.<sup>732</sup> The penalty fixes the limit of his liability at the time of the breach only, and it was his duty to discharge his liability at that time. If he delays payment, the delay is to his advantage, as he has had the use of the money from that time. The allowance of interest is to compensate the obligee for the loss of the use of the money during the time which has elapsed, and is independent of the penalty named in the bond.

<sup>728</sup> *Lewis v. Dwight*, 10 Conn. 95; *McDonald v. People*, 222 Ill. 328, 78 N. E. 609; *Dorsett v. Lambeth*, 6 La. Ann. 51; *State v. Wayman*, 2 Gill & J. (Md.) 254; *Heath v. Gay*, 10 Mass. 371; *Harris v. Clap*, 1 Mass. 308, 2 Am. Dec. 27; *Judge of Probate v. Heydock*, 8 N. H. 491; *Gutta Percha & Rubber Mfg. Co. v. Benedict*, 37 N. Y. Super. Ct. (5 Jones & S.) 430; *Looney v. Le Geirse*, 2 Willson, Civ. Cas. Ct. App. § 534; *Perry v. Horn*, 22 W. Va. 381.

<sup>729</sup> *Degnon-McLean Const. Co. v. City Trust Co.*, 99 App. Div. 195, 90 N. Y. Supp. 1029; *Folz v. Tradesmen's Co.*, 201 Pa. 583, 51 Atl. 379; *United States v. Curtis*, 100 U. S. 119, 25 L. Ed. 571.

<sup>730</sup> *Frink v. Express Co.*, 82 Ga. 33, 8 S. E. 862, 3 L. R. A. 482; *Burchfield v. Haffey*, 34 Kan. 42, 7 Pac. 548; *Leighton v. Brown*, 98 Mass. 515; *Dodge v. Perkins*, 9 Pick. (Mass.) 368; *United States v. Arnold*, 1 Gall. (U. S.) 348, Fed. Cas. No. 14,469.

<sup>731</sup> *United States v. Poulson* (D. C.) 30 Fed. 231.

<sup>732</sup> *Tyson v. Sanderson*, 45 Ala. 364; *James v. State*, 65 Ark. 415, 46 S. W. 937; *Goff v. United States*, 22 App. D. C. 512; *Holmes v. Standard Oil Co.*, 183 Ill. 70, 55 N. E. 647, affirming *Standard Oil Co. v. Holmes*, 82 Ill. App. 476; *McMullen v. Winfield Bldg. Ass'n*, 64 Kan. 298, 67 Pac. 892, 56 L. R. A. 924, 91 Am. St. Rep. 236; *Carter v. Thorn*, 18 B. Mon. (Ky.) 613; *Mayor of Natchitoches v. Redmond*, 28 La. Ann. 274; *Wyman v. Robinson*, 73 Me. 384, 40 Am. Rep. 360; *President of Bank of Brighton v. Smith*, 94 Mass. (12 Allen) 243; 90 Am. Dec. 144; *Beers v. Shannon*, 73 N. Y. 292; *Brainard v. Jones*, 18 N. Y. 35; *Tazewell's Ex'r v. Saunders*, 18 Grat. (Va.) 354; *Spokane & I. Lumber Co. v. Loy*, 21 Wash. 501, 58 Pac. 672; *Whereatt v. Ellis*, 103 Wis. 348, 79 N. W. 416, 74 Am. St. Rep. 865.

*Liability for Costs of Suit.*

As it is the duty of a surety to pay without suit, he cannot complain if he be required to pay the costs of a suit brought against him to enforce his liability, although by such payment he is compelled to pay more than the amount for which he assumed liability.<sup>733</sup>

*Unlimited Liability.*

A bond may be worded to pay claims without any restriction; and in one instrument a surety's liability may be limited by a penalty as to some matters and unlimited as to others. Thus, a surety on the bond of a contractor erecting a public building may not be liable to the obligee for defaults of the contractor for more than the penalty named therein, yet be liable to laborers and materialmen for the full amount of their claims, if the bond has so provided, although the amount exceeds the penalty.<sup>734</sup>

*Express Restriction of Liability.*

While, as a rule, a surety is not liable beyond the penalty named in the bond, a surety, where there are two or more sureties, may restrict his liability to an amount less than the penalty. This is done usually by writing, after his signature, the *amount* for which he is willing to assume liability, and he cannot be held for more,<sup>735</sup> though he is liable to the obligee to the full amount designated by him, and not pro rata.<sup>736</sup>

*Liability for Interest on Debt.*

Where a surety has assumed liability for the payment of a certain sum of money, he is liable for interest thereon,<sup>737</sup>

<sup>733</sup> *Mayor of City of New York v. Ryan*, 9 Daly (N. Y.) 316.

<sup>734</sup> *GRIFFITH v. RUNDLE*, 23 Wash. 453, 63 Pac. 199, 55 L. R. A. 381.

<sup>735</sup> *Marcy v. Praeger*, 34 La. Ann. 54; *Bullowa v. Orgo*, 57 N. J. Eq. 428, 41 Atl. 494.

<sup>736</sup> *President of Bank of Brighton v. Smith*, 94 Mass. (12 Allen) 243, 90 Am. Dec. 144; *Toucey v. Schell*, 15 Misc. Rep. 350, 37 N. Y. Supp. 879; *ELLIS v. EMMANUEL*, 1 Exch. 157.

<sup>737</sup> *State v. Wayman*, 2 Gill & J. (Md.) 254. A guarantor is liable for interest on the debt from the time of the principal's default. *Gammell v. Parramore*, 58 Ga. 54; *Gridley v. Capen*, 72 Ill. 11; *French v. Bates*, 149 Mass. 78, 21 N. E. 237, 4 L. R. A. 268; *Love v.*

unless he has made himself liable for the principal debt only.<sup>738</sup> If he wish to escape the payment of interest, he should pay the debt when it is due. Public officers are liable for interest collected by them for the use of the public funds in their custody, and their sureties are liable for their default in paying over such interest.<sup>739</sup>

*Liability for Attorney Fees of Creditor.*

Sureties are not liable for attorney fees paid by the creditor or obligee in suits against them,<sup>740</sup> unless they have agreed in their contract to become so liable;<sup>741</sup> but where the contract is to hold the obligee harmless, the surety is liable, not only for the amount of a judgment obtained against the former, but for his expenses incurred, including attorney fees for which he has become responsible.

A guarantor of collection is liable for the costs of an action brought by the creditor against the principal to enforce payment from him;<sup>742</sup> but a guarantor of payment is not liable for the costs of a suit against the principal,<sup>743</sup> nor for protest fees,<sup>744</sup> for neither protest nor suit would be necessary to fix the guarantor's liability.

*Liquidated Damages.*

If the exact amount of damage which will result from the breach of a contract is not readily ascertainable, the parties are allowed in their contract to name a fixed sum as liquidated

Railroad Co., 22 Wkly. Notes Cas. (Pa.) 171; Jefferson City Gaslight Co. v. Clark, 95 U. S. 644, 24 L. Ed. 521.

<sup>738</sup> Dorsett v. Lambeth, 6 La. Ann. 51.

<sup>739</sup> City of Chicago v. Gage, 95 Ill. 593, 35 Am. Rep. 182; Hughes v. People, 82 Ill. 78; Hunt v. State, 124 Ind. 306, 24 N. E. 887; Board of Sup'rs of Richmond Co. v. Wandel, 6 Lans. (N. Y.) 33; State v. McFetridge, 84 Wis. 473, 54 N. W. 998, 20 L. R. A. 223.

<sup>740</sup> ABBOTT v. BROWN, 131 Ill. 108, 22 N. E. 813, affirming 30 Ill. App. 376; Noll v. Smith, 68 Ind. 188.

<sup>741</sup> First Nat. Bank of Ft. Dodge v. Breese, 39 Iowa, 640.

<sup>742</sup> Tuton v. Thayer, 47 How. Prac. (N. Y.) 180; Mosher v. Hotchkiss, 3 Abb. Dec. (N. Y.) 326.

<sup>743</sup> Woodstock Bank v. Downer, 27 Vt. 539. Attorney fees in resisting an appeal are not recoverable as damages upon the bond. Kellogg v. Howes, 93 Cal. 586, 29 Pac. 230; Noll v. Smith, 68 Ind. 188; Delsher v. Gehre, 45 Kan. 583, 26 Pac. 3.

<sup>744</sup> Woolley v. Van Volkenburgh, 16 Kan. 20.

damages, which is to be paid by the party guilty of a breach. If this sum appear to be reasonable, the courts will enforce the stipulation. If, however, the sum named is greatly in excess of the probable damage, or the amount of damage can be ascertained readily, the courts presume that the sum named is a penalty, limiting the amount of recovery for a breach; and this is the presumption, whether the sum named in the contract is called liquidated damages or a penalty.<sup>745</sup> This is the general rule of contracts,<sup>746</sup> and applies to contracts of suretyship. If the sum named in the principal's contract is liquidated damages in the sense in which that expression is used properly, a surety will be liable therefor. Thus, sureties for a building contract have been held liable for a fixed sum per day to be paid for each day of delay beyond the date agreed upon by the contractor for the completion of the building.<sup>747</sup> So, a guarantor of a note has been held liable for the liquidated damages provided for therein for nonpayment at maturity.<sup>748</sup>

*Statutory Penalties.*

Sureties are not liable for statutory penalties,<sup>749</sup> unless the statute makes them so. Thus, where a statute provides that an officer selling exempt property shall be liable for double its value, the sureties upon his bond would be liable for the actual damage sustained only.<sup>750</sup>

<sup>745</sup> Fetter, Eq. p. 108.

<sup>746</sup> Clark, Cont. (2d Ed.) p. 411.

<sup>747</sup> Mercantile Trust Co. v. Hensey, 27 App. D. C. 210; Downey v. O'Donnell, 86 Ill. 49; Louisville Water Co. v. Youngstown Bridge Co., 18 Ky. Law Rep. 350; Curtis v. Brewer, 17 Pick. (Mass.) 513; Louis v. Brown, 7 Or. 328; Westerman v. Means, 12 Pa. 97.

<sup>748</sup> Gridley v. Capen, 72 Ill. 11.

<sup>749</sup> Brooks v. Governor, 17 Ala. 806; State v. Baker, 47 Miss. 88; Moretz v. Ray, 75 N. C. 170; Treasurers of South Carolina v. Hilliard, 8 Rich. Law (S. C.) 412; McDowell v. Burwell, 4 Rand. (Va.) 317.

<sup>750</sup> Casper v. People, 6 Ill. App. 28.

**COUNTERCLAIMS AGAINST CREDITOR.**

**148. A surety, when sued with the principal, can set off or recoup any demand which would be available to the principal alone.**

The right of set-off or recoupment did not exist at common law, but each party was required to enforce his rights in a separate action. As this resulted in the enforcement of claims by financially irresponsible parties against responsible ones, leaving the latter a theoretical, but no practical, remedy, and compelling a person to pay when he was equitably under no duty to do so, statutes were enacted to remedy this injustice.<sup>751</sup>

The rule was originally that a joint debt could not be set off against a separate one; nor could a separate debt be set off against a joint one. Where this rule is in force, a surety, when sued jointly with his principal, would not be allowed to oppose a counterclaim by the principal alone against the creditor.<sup>752</sup> Statutes sometimes make express provision on this point.<sup>753</sup> As a general rule it may be said that, when the surety and principal are joined as defendants, a claim due from the creditor to the principal alone can be advanced as a set-off or by way of recoupment;<sup>754</sup> though the surety, when sued alone, would have no right to avail himself of any claims of the principal against the creditor,<sup>755</sup> without the

<sup>751</sup> Stearns, *Law of Suretyship*, p. 178.

<sup>752</sup> *Woodruff v. State*, 7 Ark. (2 Eng.) 333; *Warren v. Wells*, 42 Mass. (1 Metc.) 80; *Dart v. Sherwood*, 7 Wis. 523, 76 Am. Dec. 228.

<sup>753</sup> *Springfield Engine & Thresher Co. v. Park*, 3 Ind. App. 173, 29 N. E. 444; *Wagner v. Stocking*, 22 Ohio St. 297; *Edmunds' Assignee v. Harper*, 31 Grat. (Va.) 637.

<sup>754</sup> *Cole v. Justice*, 8 Ala. 793; *Waterman v. Clark*, 76 Ill. 428, *Marcy v. Whallon*, 115 Ill. App. 435; *Bronaugh v. Neal*, 1 Rob. (La.) 23; *Raymond Bros. v. Green*, 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763; *Andrews v. Varrell*, 46 N. H. 17; *Springer v. Dwyer*, 50 N. Y. 19; *Newell v. Salmons*, 22 Barb. (N. Y.) 647; *Hollister v. Davis*, 54 Pa. 508; *Guggenheim v. Rosenfeld*, 68 Tenn. (9 Baxt.) 533; *Downer v. Dana*, 17 Vt. 518.

<sup>755</sup> *Beard v. Union Co.*, 71 Ala. 60; *Thalheimer v. Crow*, 13 Colo. 397, 22 Pac. 779; *Kingman v. Decker*, 43 Ill. App. 303; *Graff v. Kahn*, 18 Ill. App. (18 Bradw.) 485; *Purdy v. Forstall*, 45 La. Ann. 814, 13 South. 95; *Lasher v. Williamson*, 55 N. Y. 619; *Loring v.*

principal's consent;<sup>756</sup> for the principal has the right to elect whether he will recoup, or bring an independent action in which he can recover any excess that might be due him.<sup>757</sup> When the surety is sued alone, the principal can intervene for the purpose of setting off his claim.<sup>758</sup>

*Mitigation of Damages.*

Sureties can show matters in mitigation of damages, though the principal does not defend.<sup>759</sup> Thus, when sureties are sued for defalcations of their principal, they can show disbursements made by him,<sup>760</sup> or compensation which he would be entitled to withhold for his services,<sup>761</sup> or amounts received by the plaintiff, in reduction of the amount which the sureties are asked to pay.<sup>762</sup>

**ACTION AGAINST SURETY—BURDEN OF PROOF.**

**149. In an action against a surety, it is necessary for the plaintiff to allege and prove a breach of the contract.**

Morrison, 15 App. Div. 498, 44 N. Y. Supp. 526; Baltimore & O. R. Co. v. Bitner, 15 W. Va. 455, 86 Am. Rep. 820. Contra, see McAlester v. Landers, 70 Cal. 79, 11 Pac. 505; Green v. Conrad, 114 Mo. 651, 21 S. W. 839; Jarratt v. Martin, 70 N. C. 459.

In equity a surety, sued alone, may be set off a claim of the principal, because, as soon as the obligation is absolute, a surety has the right to call upon the principal to exonerate him. BECHERVAISE v. LEWIS (1872) L. R. 7 C. P. 372; Murphy v. Glass, L. R. 2 P. C. 408.

<sup>756</sup> Scholze v. Steiner, 100 Ala. 148, 14 South. 552; Wieland v. Oberne, 20 Ill. App. (20 Bradw.) 118; Reeves v. Chambers, 67 Iowa, 81, 24 N. W. 602; MAHURIN v. PEARSON, 8 N. H. 539; Balsley v. Hoffman, 13 Pa. (1 Harris) 603; Snyder v. Frankenfield, 4 Pa. Dist. R. 767. In Pennsylvania a debt due a co-surety can be set off with the consent of such co-surety. Hibert v. Lang, 165 Pa. 439, 30 Atl. 1004.

<sup>757</sup> GILLESPIE v. TORRANCE, 25 N. Y. 306, 82 Am. Dec. 355.

<sup>758</sup> Becker v. Northway, 44 Minn. 61, 46 N. W. 210, 20 Am. St. Rep. 543.

<sup>759</sup> Allen v. Smitherman, 41 N. C. 341.

<sup>760</sup> Temple St. Cable Ry. v. Hellman, 103 Cal. 634, 37 Pac. 530; Davenport v. Olmstead, 43 Conn. 67; United States v. Corwin, 1 Bond. (U. S.) 149, Fed. Cas. No. 14,870.

<sup>761</sup> Baltimore & O. R. Co. v. Jameson, 13 W. Va. 833, 31 Am. Rep. 775; Brandon v. Brandon, 3 De G. & J. 524.

<sup>762</sup> O'Brien v. McCann, 58 N. Y. 373.



**SAME—EVIDENCE OF DEFAULT.****150. Admissions and entries made by the principal are prima facie, but not conclusive, evidence of his defaults.**

It is the intention here not to take up the allegations and evidence necessary to recover judgment against a surety for a breach of his contract, as that is not within the scope of this work; but a few of the more common matters which are put forward to prove a default of an officer, when it is sought to hold his surety liable therefor, will be considered.

The rules of pleading require that the plaintiff, seeking to enforce the liability of the defendant for a breach of his contract, must allege the same; and the rules of evidence place the burden of proof upon the plaintiff likewise.<sup>763</sup> The loss of a bond does not prevent recovery from a surety thereon.<sup>764</sup>

*Admissions of Principal.*

While the declarations of the principal are admissible against him, he should not be permitted, after violating his oath of office and failing to keep faith with his surety, to furnish conclusive evidence against the latter.<sup>765</sup> The surety is bound for the actual misconduct of his principal, and not for what the principal may say he has done or not done; and, while the admissions of the principal may be prima facie evidence of a breach of the bond,<sup>766</sup> the surety is not precluded from showing the facts.<sup>767</sup>

<sup>763</sup> *Hsley v. Jones*, 12 Gray (Mass.) 260; *Craig v. Phipps*, 23 Miss. 240.

<sup>764</sup> *UNDERWOOD v. STANEY*, 1 Cases in Chan. 77.

<sup>765</sup> *Lewis v. Lee County*, 73 Ala. 148; *Jenness v. Black Hawk*, 2 Colo. 578; *Bocard v. State*, 79 Ind. 270; *Cassity v. Robinson*, 8 B. Mon. (Ky.) 279; *Chelmsford Co. v. Demarest*, 7 Gray (Mass.) 1; *City of St. Louis v. Foster*, 24 Mo. 141; *Kellum v. Clark*, 97 N. Y. 390; *Hatch v. Elkins*, 65 N. Y. 489; *Stetson v. Bank*, 2 Ohio St. 167; *White v. German Nat. Bank*, 9 Heisk. (Tenn.) 475; *Lacoste v. Bexar County*, 28 Tex. 420; *Stearns, Law of Suretyship*, p. 338.

<sup>766</sup> *Treasurers of State v. Bates*, 2 Bailey (S. C.) 362; *Simonton v. Boucher*, 2 Wash. C. C. 473, Fed. Cas. No. 12,877.

<sup>767</sup> *Stearns, Law of Suretyship*, p. 338.

*Entries by Principal.*

The same rule applies to entries made by the officer in the records kept by him;<sup>768</sup> but entries which are not made by the principal himself are inadmissible without proof as to who made them, or that the one who made them was not within the jurisdiction of the court, or that they were made in the usual course of business at the time of the transactions recorded.<sup>769</sup>

*Judgment against Principal.*

As to whether a judgment against the principal is admissible as evidence against a surety, the decisions are very conflicting; some holding that such evidence is inadmissible,<sup>770</sup> some that the judgment is prima facie evidence only,<sup>771</sup> and others that such judgment is conclusive.<sup>772</sup>

When the principal is sued, the surety, for his own protection, has the right to defend;<sup>773</sup> and, if several be sued jointly, judgment must be rendered against all or none.<sup>774</sup>

<sup>768</sup> Nolley v. Callaway County, 11 Mo. 447; Mann v. Yazoo City, 31 Miss. 574; State v. Rhoades, 6 Nev. 352.

<sup>769</sup> State Bank of Pike v. Brown, 165 N. Y. 216, 59 N. E. 1, 53 L. R. A. 513.

<sup>770</sup> Arrington v. Porter, 47 Ala. 714; Pico v. Webster, 14 Cal. 202, 73 Am. Dec. 647; Governor v. Shelby, 2 Blackf. (Ind.) 26; McCONNELL v. POOR, 113 Iowa, 133, 84 N. W. 968, 52 L. R. A. 312; De Greiff v. Wilson, 30 N. J. Eq. (3 Stew.) 435; People v. Russell, 25 Hun (N. Y.) 524; Douglass v. Howland, 24 Wend. (N. Y.) 35; McKellar v. Howell, 11 N. C. 34; Giltinan v. Strong, 64 Pa. (14 P. F. Smith) 242, reversing Strong v. Giltinan, 7 Phila. (Pa.) 176; State ex rel. Coleman v. Cason, 11 S. C. 392; Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98; Ex parte Young, 17 Ch. D. 668.

<sup>771</sup> State v. Martin, 20 Ark. 629; Weaver v. Thornton, 63 Ga. 655; Graves v. Bulkley, 25 Kan. 249, 37 Am. Rep. 249; Mullen v. Scott, 9 La. Ann. 173; Parr v. State, 71 Md. 220, 17 Atl. 1020; City of Lowell v. Parker, 10 Metc. (Mass.) 309, 43 Am. Dec. 436; Robinson v. Lane, 22 Miss. (14 Smedes & M.) 161; LaFayette Mut. Bldg. Ass'n v. Kleinhoffer, 40 Mo. App. 388; State, to Use of Story, v. Jennings, 14 Ohio St. 73; Atkins v. Bally, 9 Yerg. (Tenn.) 111; Munford v. Overseers, 2 Rand. (Va.) 313; Ihrig v. Scott, 13 Wash. 559, 43 Pac. 633; Stephens v. Shafer, 48 Wis. 54, 8 N. W. 835, 33 Am. Rep. 793; Drummond v. Prestman, 25 U. S. (12 Wheat.) 515, 6 L. Ed. 712.

<sup>772</sup> See Stearns, Law of Suretyship, p. 340; 40 Cent. Dig. col. 2110.

<sup>773</sup> Jewett v. Crane, 35 Barb. (N. Y.) 208.

<sup>774</sup> KINGSLAND v. KOEPPE, 137 Ill. 344, 28 N. E. 48, 13 L. R. A. 649.

Where the obligation of the surety is to hold the obligee harmless, a judgment obtained against the latter as to matters covered in the bond would be evidence of a default, whether any steps had been taken to enforce the collection of the judgment or not.<sup>175</sup>

*Summary Remedies.*

Statutes sometimes allow summary remedies to be taken against sureties on bonds, where such bonds are made a part of the record, and separate actions need not be instituted against them. Thus, an appellate court, on affirming the judgment appealed from, may enter judgment against the sureties upon the appeal bond.<sup>176</sup> Such statutes are constitutional.<sup>177</sup>

**SURETY'S RIGHT OF SUBROGATION.**

151. Upon full satisfaction by a surety of the amount due the creditor or obligee, the surety is entitled to all means held at any time by the creditor or obligee for enforcing payment of that particular claim from the principal or from a co-surety, whether the surety paid in ignorance of the existence of such means or not.

**CREDITOR'S RIGHT OF SUBROGATION.**

152. The creditor is entitled to the benefit of any security given by the principal to the surety for the indemnity of the latter as to that particular debt, provided the surety has not surrendered the same in good faith after the debt is due; but the creditor is not entitled to any security given to the surety by a stranger.

<sup>175</sup> Bridgeport Fire & Marine Ins. Co. v. Wilson, 34 N. Y. 275. See note 439, supra.

<sup>176</sup> Callahan v. Saleski, 29 Ark. 216; Hawley v. Gray Co., 127 Cal. 560, 60 Pac. 437; Shannon v. Dodge, 18 Colo. 164, 32 Pac. 61; Libby v. Husby, 28 Minn. 40, 8 N. W. 903; Kiernan v. Cameron, 66 Miss. 442, 6 South. 206; Lowe v. Riley, 57 Neb. 252, 77 N. W. 758; Holbrook v. Investment Co., 32 Or. 104, 51 Pac. 451; Hiccock v. Bell, 46 Tex. 610.

<sup>177</sup> Ladd v. Parnell, 57 Cal. 232; Welmer v. Bunbury, 30 Mich. 201; People ex rel. Loh v. Wayne Circuit, 28 Mich. 186; Bank of Mississippi v. Duncan, 52 Miss. 740.

*Subrogation an Equitable Right.*

One very important right which a surety has against the creditor or obligee is that of subrogation; that is, the right to be substituted in the latter's place upon payment of the amount due, and to enforce any securities, benefits, and advantages held by him.<sup>778</sup> The right is of equitable origin,<sup>779</sup> and is applied under equitable principles. While it finds wide application to contracts of suretyship, it is not confined to such cases.

*Subrogation as Affected by Agreement.*

The right is not affected by a surety's acceptance of security for the debt,<sup>780</sup> and is independent of any agreement;<sup>781</sup> but, like most rights given by operation of law, it may be enlarged or restricted, or entirely taken away,<sup>782</sup> by an express

<sup>778</sup> *Fawcetts v. Kimmey*, 33 Ala. 261; *Talbot v. Wilkins*, 31 Ark. 411; *Stamford Bank v. Benedict*, 15 Conn. 437; *Billings v. Sprague*, 49 Ill. 509; *Foss v. Chicago*, 34 Ill. 488; *Josselyn v. Edwards*, 57 Ind. 212; *Storms v. Storms*, 3 Bush (Ky.) 77; *Norton v. Soule*, 2 Greenl. (Me.) 341; *Crisfield v. State*, 55 Md. 192; *Torp v. Gulseth*, 37 Minn. 135, 33 N. W. 550; *Dozier v. Lewis*, 27 Miss. 679; *Grady v. O'Reilly*, 116 Mo. 340, 22 S. W. 798; *Guthrie v. Ray*, 36 Neb. 612, 54 N. W. 971; *Ætna Ins. Co. v. Thompson*, 68 N. H. 20, 40 Atl. 396, 73 Am. St. Rep. 552; *Price v. Trusdell*, 28 N. J. Eq. 200; *State Bank of Lock Haven v. Smith*, 155 N. Y. 185, 49 N. E. 680; *Mathews v. Alkin*, 1 N. Y. 595; *Butler v. Birkey*, 13 Ohio St. 514; *Klopp v. Lebanon Bank*, 46 Pa. 88; *Gossin v. Brown*, 11 Pa. 527; *Muller v. Wadlington*, 5 S. C. 342; *Henry v. Compton*, 2 Head (Tenn.) 549; *James v. Jacques*, 26 Tex. 320, 82 Am. Dec. 613; *National Bank of Royalton v. Cushing*, 53 Vt. 321; *Yonge v. Reynell*, 9 Hare, 809. *Fetter, Equity*, p. 254. The surety does not acquire, by subrogation, any superior rights than the creditor had. Thus, if the creditor is not a holder for value without notice of defenses to a note taken as collateral security, the surety does not become a holder without notice. *Rockefeller v. Larick* (Neb.) 110 N. W. 1022.

<sup>779</sup> *MATHEWS v. AIKIN*, 1 N. Y. 595.

<sup>780</sup> *Crawford v. Richeson*, 101 Ill. 351; *Wesley Church v. Moore*, 10 Pa. 273; *West v. Rutland Bank*, 19 Vt. 403.

<sup>781</sup> *EMMERT v. THOMPSON*, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566; *PHILBRICK v. SHAW*, 61 N. H. 356; *BRINSON v. THOMAS*, 55 N. C. 414; *Dempsey v. Bush*, 18 Ohio St. 376; *COTTRELL'S APPEAL*, 23 Pa. 294.

<sup>782</sup> *Whitman v. Gaddie*, 7 B. Mon. (Ky.) 591; *Dillon v. Scofield*, 11 Neb. 419, 9 N. W. 554; *Hartwell v. Smith*, 15 Ohio St. 200;

agreement. Conventional subrogation—that is, where the parties have entered into a contract with reference to the evidence of indebtedness or the means of enforcing or executing it<sup>783</sup>—may give a surety advantages which he could not secure under the rights given him at law.<sup>784</sup>

As the right of subrogation, independent of contract, is applied under equitable principles, a surety is not allowed to speculate to the disadvantage of his principal, but can enforce any securities which he obtains to the extent of reimbursement only. If he has settled the claim for less than its face value, he can enforce securities to the extent of the amount actually paid, and no more;<sup>785</sup> but there is nothing to prevent the surety dealing with the creditor in respect to the securities the same as a third person might, and if the creditor, upon payment of less than the amount due, is willing to assign the securities to the surety, the latter, like any other assignee of the claim, could enforce it for its full face value.

On the other hand, a surety, upon paying the debt, may consent to a restoration of the securities to the debtor, and relinquish the benefits which the law has bestowed upon him.<sup>786</sup>

*Indebtedness Must be Satisfied in Full.*

It is essential that the surety fully satisfy the claim of the creditor or obligee before there will be any right of subrogation.<sup>787</sup> So long as any part, however small, of the indebt-

Yeager's Appeal, 19 Wkly. Notes Cas. (Pa.) 151; Cowan v. Duncan, Melgs (Tenn.) 470; Harnsberger v. Yancey, 33 Grat. (Va.) 527.

<sup>783</sup> Stearns, Law of Suretyship, p. 506.

<sup>784</sup> Morrow v. United States Mortg. Co., 96 Ind. 21.

<sup>785</sup> See post, § 160.

<sup>786</sup> Tyus v. De Jarnette, 26 Ala. 280; COOPER v. JENKINS, 32 Beav. 337.

<sup>787</sup> Schoonover v. Allen, 40 Ark. 132; Stamford Bank v. Benedict, 15 Conn. 437; Bridges v. Nicholson, 20 Ga. 90; Darst v. Bates, 51 Ill. 439; Covey v. Neff, 63 Ind. 391; Rice v. Downing, 12 B. Mon. (Ky.) 44; Grief v. Steamboat, 12 La. Ann. 8; Neptune Ins. Co. v. Dorsey, 3 Md. Ch. 334; Swan v. Patterson, 7 Md. 164; Wilcox v. Fairhaven Bank, 7 Allen (Mass.) 270; Gannett v. Blodgett, 39 N. H. 150; Freehold Nat. Banking Co. v. Brick, 37 N. J. Law, 307; Hoover v. Epler, 52 Pa. 522; Couates' Appeal, 7 Watts & S. (Pa.) 99; Church, Petitioner, 16 R. I. 231, 14 Atl. 874; Gilliam v. Esselman, 5 Sneed (Tenn.) 86; Barton v. Brent, 87 Va. 385, 13 S. E. 29.

edness remains unpaid,<sup>788</sup> the creditor has a right to the possession of any security he may have to enforce payment,<sup>789</sup> and cannot be compelled to part with it. He is not obliged to assume any risk or inconvenience,<sup>790</sup> and subrogation will not be allowed, except in a clear case, where it will not work any injustice to him.<sup>791</sup> He may consent to subrogation before the debt is paid,<sup>792</sup> and the principal, or his other creditors, will not be heard to complain.<sup>793</sup>

The rule that the entire indebtedness must be paid before there can be any subrogation applies to several debts of the principal, or to a debt payable in installments, with the surety liable for one debt or for one installment only. All the debts<sup>794</sup> or installments<sup>795</sup> must be paid before the creditor can be compelled to yield any portion of his security, though the surety is liable for one only.

However, the surety will have a right to subrogation as soon as the entire debt has been paid, although he has paid but a part of it; the principal having paid the balance.<sup>796</sup>

<sup>788</sup> *Conwell v. McGowan*, 53 Ill. 363; *Opp v. Ward*, 125 Ind. 241, 24 N. E. 974, 21 Am. St. Rep. 220; *Bartholomew v. Bank*, 57 Kan. 594, 47 Pac. 519; *Willingham v. Trust Co.*, 56 S. W. 706, 22 Ky. Law Rep. 153; *Brough's Estate*, 71 Pa. 460.

<sup>789</sup> *MUSGRAVE v. DICKSON*, 172 Pa. 629, 33 Atl. 705, 51 Am. St. Rep. 765.

<sup>790</sup> *McConnell v. Beattie*, 34 Ark. 113; *Commonwealth of Virginia v. Chesapeake Co.*, 32 Md. 501; *Magee v. Leggett*, 48 Miss. 139; *Ames v. Huse*, 55 Mo. App. 422; *Receivers of New Jersey Midland Ry. Co. v. Wortendyke*, 27 N. J. Eq. 658; *Kyner v. Kyner*, 6 Watts (Pa.) 221.

<sup>791</sup> *Welch v. Parran*, 2 Gill (Md.) 320; *Parker v. Mercer*, 7 Miss. 320, 38 Am. Dec. 438; *Lloyd v. Galbraith*, 32 Pa. 103; *Harlan v. Sweeny*, 1 Lea (Tenn.) 682.

<sup>792</sup> *Fisher v. Columbia Ass'n*, 59 Mo. App. 430; *Receivers of New Jersey Midland Ry. Co. v. Wortendyke*, 27 N. J. Eq. 658.

<sup>793</sup> *Motley v. Harris*, 1 Lea (Tenn.) 577.

<sup>794</sup> *Wilcox v. Fairhaven Bank*, 7 Allen (Mass.) 270; *Sipe v. Taylor* (Va. 1906) 55 S. E. 542; *Ex parte MARSHAL*, 1 Atk. 120. Of course, it is otherwise if there is a provision to that effect. *Allison v. Sutherland*, 50 Mo. 274.

<sup>795</sup> *Carithers v. Stuart*, 87 Ind. 424; *Massie v. Mann*, 17 Iowa, 131; *GRUBBS v. WYSORS*, 32 Grat. (Va.) 127.

<sup>796</sup> *Magee v. Leggett*, 48 Miss. 139; *Hess' Estate*, 69 Pa. 272; *Neal v. Buffington*, 42 W. Va. 327, 26 S. E. 172.

If the creditor has security for a particular debt, he cannot deprive a surety for that debt of the right to the benefit of such security after the debt has been paid, because the principal still owes him for advances afterwards made.<sup>797</sup>

*Subrogation Not Allowed to Volunteers.*

The payment must be made by the surety, or by his authority, or by some one having an interest in the matter, to give the right of subrogation against the principal. A stranger cannot obtain this right by making a voluntary payment, even though he thought he was a surety;<sup>798</sup> but a general agent, who, to protect his own interest, is compelled to pay the default of an agent, may be subrogated to the rights of the creditor.<sup>799</sup> The right of subrogation extends to one who is actually a guarantor, though he became such without the request of the principal.<sup>800</sup>

*Co-Sureties Subrogated Proportionately.*

If two or more sureties have paid the debt, they will be subrogated in proportion to the amount paid.<sup>801</sup>

*Sureties in the Broad Sense Entitled to Subrogation.*

This right of subrogation is not confined to sureties in the narrow sense, but will be exercised in favor of guarantors,<sup>802</sup> indorsers,<sup>803</sup> accommodation parties,<sup>804</sup> or joint debtors;<sup>805</sup>

<sup>797</sup> *FORBES v. JACKSON* (1882) 19 Ch. D. 615. See *Hardcastle v. Commercial Bank*, 1 Har. 374.

<sup>798</sup> *Dawson v. Lee*, 83 Ky. 49; *Fink v. Mahaffy*, 8 Watts (Pa.) 384.

<sup>799</sup> *Hough v. Insurance Co.*, 57 Ill. 318, 11 Am. Rep. 18; *Young v. Morgan*, 89 Ill. 199.

<sup>800</sup> *Davis v. Schlemmer*, 150 Ind. 472, 50 N. E. 373; *Bishop v. Rowe*, 71 Me. 263; *MATHEWS v. AIKIN*, 1 N. Y. 595.

<sup>801</sup> *Bank of Pennsylvania v. Potius*, 10 Watts (Pa.) 148.

<sup>802</sup> *Voltz v. Bank*, 158 Ill. 532, 42 N. E. 69, 30 L. R. A. 155; *Hamilton v. Johnston*, 82 Ill. 39.

<sup>803</sup> *Lyon v. Bolling*, 9 Ala. 463, 44 Am. Dec. 444; *Schoonover v. Allen*, 40 Ark. 132; *Dooley v. Lackey*, 55 Ill. App. 30; *Hoffman v. Butler*, 105 Ind. 371, 4 N. E. 681. *Des Moines Sav. Bank v. Colfax*

<sup>804</sup> *Bank of Toronto v. Hunter*, 4 Bosw. (N. Y.) 646.

<sup>805</sup> *McCready v. Van Antwerp*, 24 Hun (N. Y.) 322; *Vincent v. Logsdon*, 17 Or. 284, 20 Pac. 429; *Greenlaw v. Pettit*, 87 Tenn. 467, 11 S. W. 357; *Wheatley's Heirs v. Calhoun*, 12 Leigh (Va.) 264, 37 Am. Dec. 634; *The Hattie M. Spraker* (D. C.) 29 Fed. 457.

and of those who become sureties involuntarily, such as the grantor of mortgaged property to one who has assumed the mortgage debt,<sup>806</sup> or a retiring partner whose liability for the firm's indebtedness has been assumed by the continuing partners;<sup>807</sup> and of real sureties,<sup>808</sup> such as pledgors,<sup>809</sup> or grantees, under warranty deeds, of property subject to liens.<sup>810</sup>

*Supplemental Surety Entitled to Subrogation.*

A supplemental surety has the right of subrogation;<sup>811</sup> the surety occupying, as to him, the relation of principal. His right extends, not only to such means as the creditor has of enforcing payment from the principal,<sup>812</sup> but also to such means as the creditor has for enforcing payment from the surety.<sup>813</sup>

Co., 79 Iowa, 497, 44 N. W. 718; *Seixas v. Gonsoulin*, 40 La. Ann. 351, 4 South. 453; *Beckwith v. Webber*, 78 Mich. 390, 44 N. W. 330; *Bridgman v. Johnson*, 44 Mich. 491, 7 N. W. 83; *Yates v. Mead*, 68 Miss. 787, 10 South. 75; *Eno v. Crooke*, 10 N. Y. 60; *Corey v. White*, 3 Barb. (N. Y.) 12; *Baily v. Brownfield*, 20 Pa. 41; *Old Dominion Bank v. Allen*, 78 Va. 200; *DUNCAN v. NORTH AND SOUTH WALES BANK* (1880) 6 App. Cas. 1; *Woodward v. Pell*, L. R. 4 Q. B. 55.

<sup>806</sup> *Orrick v. Durham*, 79 Mo. 174; *Ayers v. Dixon*, 78 N. Y. 318; *Johnson v. Zink*, 51 N. Y. 333; *Lowry v. McKinney*, 68 Pa. 294.

<sup>807</sup> *Chandler v. Higgins*, 109 Ill. 602; *Conwell v. McCowan*, 81 Ill. 285; *Laylin v. Knox*, 41 Mich. 40, 1 N. W. 913; *Swan v. Smith*; 57 Miss. 548; *Merrill v. Green*, 55 N. Y. 270; *Scott's Appeal*, 88 Pa. 173; *Frow Estate*, 73 Pa. 459; *Ætna Ins. Co. v. Wires*, 28 Vt. 93.

<sup>808</sup> *Jefferson v. Edrington*, 53 Ark. 545, 14 S. W. 903.

<sup>809</sup> *Sheldie v. Weishlee*, 16 Pa. 134.

<sup>810</sup> *Beall v. Walker*, 26 W. Va. 741.

<sup>811</sup> *Rittenhouse v. Levering*, 6 Watts & S. (Pa.) 190; *LEAKE v. FERGUSON*, 2 Grat. (Va.) 419; *GODDARD v. WHYTE*, 2 Giffard, 449; *PARSONS v. BRIDDOCK*, 2 Vernon, 608. See, also, *PHILBRICK v. SHAW*, 61 N. H. 356.

<sup>812</sup> Where an indorser has paid the debt by giving a note with surety, and the principal has reimbursed the indorser, the supplemental surety cannot have subrogation to the note against the original principal. *NEW YORK STATE BANK v. FLETCHER*, 5 Wend. (N. Y.) 85.

<sup>813</sup> *Dunlap v. Foster*, 7 Ala. 734; *Monson v. Drakeley*, 40 Conn. 552, 16 Am. Rep. 74; *Bradenburg v. Flynn*, 12 B. Mon. (Ky.) 397; *Dillon v. Scofield*, 11 Neb. 419, 9 N. W. 554; *BRINSON v. THOMAS*, 55 N. C. 414; *Hartwell v. Smith*, 15 Ohio St. 200; *Pott v. Nathans*, 1 Watts & S. (Pa.) 155, 37 Am. Dec. 456. If the creditor himself has ex-



As has been explained,<sup>814</sup> the most common cases involving the rights of a supplemental surety arise upon successive appeals; the primary liability resting upon the sureties on the last appeal bond. Upon payment by any surety, or set of sureties, other than the last set, the surety or sureties so paying will be subrogated to the right of the creditor to enforce the liability of sureties on any appeal bond given after such surety or sureties became liable.<sup>815</sup> An indorser occupies the position of a supplemental surety as to prior parties, who are sureties.<sup>816</sup> The principal is not entitled to subrogation against his sureties.

*Subrogation Against Co-Surety.*

Where one of two or more co-sureties pays the debt, he will be subrogated to such means of enforcing the debt against the other sureties as the creditor possessed.<sup>817</sup> Thus, where one surety on a promissory note pays it, he will be entitled to enforce it against another surety for the latter's share of the debt.

hausted all of the rights upon an appeal bond given to him, there cannot be any subrogation thereto. *CHESTER v. BRODERICK*, 131 N. Y. 549, 30 N. E. 507.

<sup>814</sup> See note 638, *supra*.

<sup>815</sup> *Friberg v. Donovan*, 23 Ill. App. 58; *Kellar v. Williams*, 10 Bush (Ky.) 216; *Hinckley v. Kreitz*, 58 N. Y. 583; *Briggs v. Hinton*, 14 Lea (Tenn.) 233.

<sup>816</sup> See *Stearns, Law of Suretyship*, p. 484.

<sup>817</sup> *Dowdy v. Blake*, 50 Ark. 205, 6 S. W. 897, 7 Am. St. Rep. 88; *Sumner v. Rhodes*, 14 Conn. 135; *Simpson v. Gardiner*, 97 Ill. 237; *Schoenewald v. Dieden*, 8 Ill. App. 389; *Hall v. Hall*, 34 Ind. 314; *Koboliska v. Swehla*, 107 Iowa, 124, 77 N. W. 576; *Smith v. Latimer*, 15 B. Mon. (Ky.) 75; *Whitehead's Succession*, 3 La. Ann. 396; *Smith v. Rumsey*, 33 Mich. 183; *Furnold v. Bank*, 44 Mo. 336; *Vincent v. Logsdon*, 17 Or. 284, 20 Pac. 429; *Greenlaw v. Pettit*, 87 Tenn. 467, 11 S. W. 357; *Stebbins v. Willard*, 53 Vt. 665; *PACE v. PACE*, 95 Va. 792, 30 S. E. 361, 44 L. R. A. 459; *German American Sav. Bank v. Fritz*, 68 Wis. 390, 32 N. W. 123; *Pratt v. Law*, 9 Cranch (U. S.) 456, 3 L. Ed. 791; *Campbell v. Pratt*, 5 Wheat. (U. S.) 429, 5 L. Ed. 126. In England, under the mercantile law amendment act of 1856 (St. 19 & 20 Vict. c. 94, § 5), a co-guarantor is entitled to stand in the place of the judgment creditor to enforce contribution, although there is no assignment of the judgment. In *re M'MYN*, 33 Ch. D. 575; In *re Cochran's Estate*, 5 Eq. 209.

*Subrogation to Property of Principal in Creditor's Possession.*

The right of subrogation extends, as a general rule, to any property in the possession of the creditor, such as a pledge, which the latter would be justified in retaining on account of the indebtedness.

*No Subrogation to Property of Principal Which Creditor Holds for Other Purposes.*

However, it does not follow that, because the creditor has funds or property of the principal in his possession, the surety would be entitled to subrogation thereto, if such funds or property were not connected in some way with the indebtedness. Thus, where the creditor is a bank having funds of the principal on deposit, the bank is justified in honoring the checks of the principal, and a surety is not entitled to subrogation to such deposit.<sup>818</sup> The bank had received the deposit under a contract entirely independent from any other contract with the principal.<sup>819</sup>

*Subrogation to Rights of Action.*

The right of subrogation extends, not only to property, but to any means of enforcing payment,<sup>820</sup> or of reaching property,

<sup>818</sup> *Voss v. German Bank*, 83 Ill. 599, 25 Am. Rep. 415; *National Bank of Newburgh v. Smith*, 66 N. Y. 271, 23 Am. Rep. 48; *Grissom v. Commercial Bank*, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669.

<sup>819</sup> See note 499, *supra*.

<sup>820</sup> *Saint v. Ledyard*, 14 Ala. 244; *Skiff v. Cross*, 21 Iowa, 459; *Merryman v. State*, 5 Har. & J. (Md.) 423; *Sweet v. Jeffries*, 48 Mo. 279; *Boughton v. Bank*, 2 Barb. Ch. (N. Y.) 458; *BITTICK v. WILKINS*, 7 Helsk. (Tenn.) 307; *Ex parte RUSHFORTH*, 10 Vesey, 409; *Ex parte TURNER*, 3 Vesey, 243. A surety is entitled to the means which the state has to enforce payment of the debt from the principal. *Dias v. Bouchaud*, 10 Paige (N. Y.) 445; *Id.*, 3 Edw. Ch. (N. Y.) 485; *United States v. Hunter*, 5 Mason (U. S.) 62, Fed. Cas. No. 15,426; *REGINA v. ROBINSON*, Hurl. & N. 275, note (a); *Regina v. Salter*, 1 Hurl. & N. 274. The surety may be subrogated to a bond. *QUEEN v. DOUGHTY*, Wight. 2, note (b). Or to a promissory note (*Sublett's Adm'r v. McKinney*, 19 Tex. 438), although the note is marked "paid" (*WRIGHT v. GROVER*, 82 Pa. 80). Where the surety's liability arises on a different instrument from that of the principal, there is no question as to his right to an assignment of that instrument to him. *Dodd v. Wilson*, 4 Del. Ch. 399; *Livingston v. Anderson*, 80 Ga. 175, 5 S. E. 48; *Allen v. Powell*, 108 Ill. 584;

such as a mortgage <sup>821</sup> given by the principal. Sureties for the purchase price of land sold to the principal, the legal title remaining in the grantor, are entitled to subrogation to the latter's rights against the principal; <sup>822</sup> and a surety may be subrogated to the dividends from a bankrupt principal's estate. <sup>823</sup> Sureties have the right to pursue a fund misapplied by their principal, if they can find it and identify it. <sup>824</sup> So a surety can be subrogated to the right of the creditor to set aside a fraudulent conveyance made by the principal, <sup>825</sup> and a surety for a lessee will be subrogated to the landlord's right to distrain. <sup>826</sup>

#### *Subrogation to Liens.*

The right of subrogation extends to all liens, as that word is used in a broad sense, <sup>827</sup> even as against those who have ac-

Davis v. Schlemmer, 150 Ind. 472, 50 N. E. 373; Tardy v. Allen, 3 La. Ann. 66; Ferguson's Adm'r v. Carson, 86 Mo. 673; Townsend v. Whitney, 75 N. Y. 425; Fifth Nat. Bank of Cincinnati v. Woolsey, 31 App. Div. 61, 52 N. Y. Supp. 827; Keokuk Falls Imp. Co. v. Kingsland Co., 5 Okl. 32, 47 Pac. 489; Elkinton v. Newman, 20 Pa. 281; Hill v. Manser, 11 Grat. (Va.) 522; Murray v. Meade, 5 Wash. 693, 32 Pac. 780; Brown v. Decatur, 4 Cranch, C. C. (U. S.) 477, Fed. Cas. No. 2,001; In re Lord Churchill, 39 Ch. D. 174.

<sup>821</sup> Fawcetts v. Kimmey, 33 Ala. 261; City Nat. Bank of Ottawa v. Dudgeon, 65 Ill. 11; Jacques v. Fackney, 64 Ill. 87; McLean v. Towle, 3 Sandf. Ch. (N. Y.) 117; Gossin v. Brown, 11 Pa. 527; Miller v. Pendleton, 4 Hen. & M. (Va.) 436; DREW v. LOCKETT, 32 Beavan, 499.

<sup>822</sup> Beattie v. Dickinson, 39 Ark. 205; Ballew v. Roler, 124 Ind. 557, 24 N. E. 976, 9 L. R. A. 481; Highland v. Anderson, 17 S. W. 866, 13 Ky. Law Rep. 710; Myres v. Yaple, 60 Mich. 339, 27 N. W. 536; Torp v. Gulseth, 37 Minn. 135, 33 N. W. 550; FULKERSON v. BROWNLEE, 69 Mo. 371; Stenhouse v. Davis, 82 N. C. 432; Deitzler v. Mishler, 37 Pa. 82; Galliher v. Galliher, 10 Lea (Tenn.) 23.

<sup>823</sup> Nat. Bankr. Act July 1, 1898, c. 541, § 574, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]; Ex parte ATKINSON, Cooke, Bankr. Laws (8th Ed.) 232; Ex parte Johnson, 3 De G., M. & G. 218.

<sup>824</sup> BLAKE v. TRADERS' NAT. BANK, 145 Mass. 13, 12 N. E. 414; PIERCE v. HOLZER, 65 Mich. 283, 32 N. W. 431; Neely v. Rood, 54 Mich. 134, 19 N. W. 920, 52 Am. Rep. 802; Clark v. First Nat. Bank, 57 Mo. App. 277.

<sup>825</sup> Martin v. Walker, 12 Hun (N. Y.) 46; Tatum v. Tatum, 36 N. C. 113.

<sup>826</sup> Hall v. Hoxsey, 84 Ill. 616.

<sup>827</sup> Huffmound v. Bence, 128 Ind. 131, 27 N. E. 347. A surety is

quired interests thereafter,<sup>828</sup> but not to such intangible rights as are sometimes called liens, which are discharged as soon as payment is made,<sup>829</sup> such as the right given by statute to an unpaid seller of supplies to a vessel.<sup>830</sup>

*Subrogation to Judgments.*

If the creditor has instituted suit before payment by the surety, the latter is entitled to be substituted to the place of the creditor; and, if judgment has been obtained, the surety can be subrogated to the judgment,<sup>831</sup> whether the judgment

entitled to the benefit of the lien of a judgment against himself, the principal, and his co-sureties. *Bragg v. Patterson*, 85 Ala. 233, 4 South. 716; *Hardcastle v. Commercial Bank*, 1 Har. 374; *Chandler v. Higgins*, 109 Ill. 602; *Searing v. Berry*, 58 Iowa, 20, 11 N. W. 708; *Smith v. Rumsey*, 33 Mich. 183; *Benne v. Schnecko*, 100 Mo. 250, 13 S. W. 82; *Boltz's Estate*, 133 Pa. 77, 19 Atl. 303; *German American Sav. Bank v. Fritz*, 68 Wis. 390, 32 N. W. 123. To vendor's lien for purchase money. *Lang v. Constance*, 46 S. W. 693, 20 Ky. Law Rep. 502; *UZZELL v. MACK*, 4 Humph. (Tenn.) 319, 40 Am. Dec. 648. To the lien of a corporation on the shares of its stockholders. *Young v. Vough*, 23 N. J. Eq. 325; *Klopp v. Lebanon Bank*, 46 Pa. 88; *Petersburg Sav. & Ins. Co. v. Lumsden*, 75 Va. 327. To statutory liens. *Cummings v. Macy*, 110 Ala. 479, 20 South. 307; *Hook v. Richeson*, 115 Ill. 431, 5 N. E. 98; *Richeson v. Crawford*, 94 Ill. 165; *McCoy v. Wood*, 70 N. C. 125.

<sup>828</sup> *Goodyear v. Watson*, 14 Barb. (N. Y.) 481; *Dempsey v. Bush*, 18 Ohio St. 376; *Fleming v. Beaver*, 2 Rawle (Pa.) 128, 19 Am. Dec. 629; *Garvin v. Garvin*, 27 S. C. 472, 4 S. E. 148; *Buchanan v. Clark*, 10 Grat. (Va.) 164.

<sup>829</sup> *McNeill's Adm'r v. McNeill*, 36 Ala. 109, 76 Am. Dec. 320; *UZZELL v. MACK*, 4 Humph. (Tenn.) 319, 40 Am. Dec. 648. Where a surety on a note given for the purchase price of land buys the land at an execution sale under a judgment obtained on the note, he cannot be subrogated to the vendor's lien, as that has been extinguished by the sale, and he takes the land subject to the junior liens. *Hall v. Jones*, 21 Md. 439.

<sup>830</sup> *Hays v. Columbus*, 23 Mo. 232.

<sup>831</sup> *Lumpkin v. Mills*, 4 Ga. 343; *Norton v. Soule*, 2 Greenl. (Me.) 341; *Goodyear v. Watson*, 14 Barb. (N. Y.) 481; *Hill v. King*, 48 Ohio St. 75, 26 N. E. 988; *PARSONS v. BRIDDOCK*, 2 Vern. 608. The fact that the judgment has been paid does not extinguish it for the purpose of subrogation, as it has to be paid before the surety would be entitled to subrogation. *COTTRELL'S APPEAL*, 23 Pa. 294.

be against the principal alone, or against the principal and surety.<sup>832</sup>

*Subrogation to Privileges.*

Subrogation extends, not only to the rights which the creditor has to enforce his claim, but to any privileges which he has in connection therewith. Thus, a surety is entitled to a stipulation in a note for attorney fees.<sup>833</sup> If the creditor is entitled to a priority in the payment of a debt due, a surety paying the debt is entitled to such priority.<sup>834</sup>

*Assignment to Surety.*

A surety has the right, when paying the creditor, to take an assignment of the evidence of indebtedness, and can enforce it against his principal.<sup>835</sup>

*Advantage of Subrogation over Principal's Implied Contract to Indemnify Surety.*

As will be shown in a subsequent chapter, a surety, upon payment of the debt, has a right of action for indemnity from his principal.<sup>836</sup> As this right arises under an implied contract, it would be barred, in most states, sooner than the right of action which the creditor had on the written instrument or judgment. For this reason, where the surety is subrogated to the rights of the creditor on a written contract, or has taken an assignment thereof, he will possess rights superior to those

<sup>832</sup> *Townsend v. Whitney*, 15 Hun (N. Y.) 93; *Jennings v. Hare*, 104 Pa. 489.

<sup>833</sup> *Carpenter v. Minter*, 72 Tex. 370. 12 S. W. 180.

<sup>834</sup> *Muldoon v. Crawford*, 14 Bush (Ky.) 125; *Robertson v. Trigg's Adm'r*, 32 Grat. (Va.) 76; *LIDDERDALE v. ROBINSON*, 12 Wheat. (U. S.) 594, 6 L. Ed. 740; *Manisty v. Churchill*, 39 Ch. D. 174.

<sup>835</sup> A surety can have a judgment assigned to him. *Bragg v. Patterson*, 85 Ala. 233. 4 South. 716; *Harris v. Frank*, 29 Kan. 200; *Morris v. Evans*, 2 B. Mon. (Ky.) 84, 36 Am. Dec. 591; *Creager v. Brenngle*, 5 Har. & J. (Md.) 234, 9 Am. Dec. 516; *Benne v. Schnecko*, 100 Mo. 250, 13 S. W. 82; *Townsend v. Whitney*, 75 N. Y. 425; *Goodyear v. Watson*, 14 Barb. (N. Y.) 481; *COTTRELL'S APPEAL*, 23 Pa. 294; *Sublett's Adm'r v. McKinney*, 19 Tex. 438. Contra, *Sherwood v. Collier*, 14 N. C. 380, 24 Am. Dec. 264; *DOWBIGGEN v. BOURNE*, 2 Younge & C. 462. A surety can have an attachment assigned to him. *Brewer v. Franklin Mills*, 42 N. H. 292. See post, § 158.

<sup>836</sup> See post, § 154.

which he had on his implied contract for indemnity.<sup>837</sup> Another advantage given under the right of subrogation is that it enables him to take precedence over subsequent incumbrances.<sup>838</sup> If a tract of land of the principal be subject to two mortgages, a surety for the debt secured by the first mortgage, upon payment of the debt, can foreclose the first mortgage, and cut out the second one; whereas, his right of indemnity against the principal alone might be practically worthless.<sup>839</sup>

*What Rights Are Not Subject to Subrogation.*

Subrogation will not be allowed, however, where it would be contrary to public policy,<sup>840</sup> or would confer no benefit to the surety beyond his gratification of a spite.<sup>841</sup> Thus, sureties on a bail bond will not be entitled to the peculiar remedies of the state against a criminal;<sup>842</sup> nor would sureties for a railway company, who have failed to pay for land taken by the latter, be subrogated to the right of the landowner to eject the company.<sup>843</sup>

*Subrogation Extends to Securities Received at Any Time, and Continues After Their Release by Creditor.*

As the right of subrogation exists independently of contract, it extends not only to securities which existed at the time the contract of suretyship was entered into,<sup>844</sup> but to all re-

<sup>837</sup> *Giddens v. Williamson*, 65 Ala. 439; *Hull v. Myers*, 90 Ga. 674, 16 S. E. 653; *Sparks v. Childers*, 2 Ind. T. 187, 47 S. W. 316; *Par-tee v. Mathews*, 53 Miss. 140; *SMITH v. SWAIN*, 7 Rich. Eq. (S. C.) 112; *Sublett's Adm'r v. McKinney*, 19 Tex. 438. In *CROMER v. CROMER*, 29 Grat. (Va.) 280, it was held that sureties for a guardian were not entitled to the benefit of the exception of a fiduciary debt from the operation of the bankruptcy law, as it ceased to be a fiduciary debt when paid by the sureties to the ward.

<sup>838</sup> *COTTRELL'S APPEAL*, 23 Pa. 294; *HOTHAM v. STONE*, Turn. & R. 226, note (c).

<sup>839</sup> *Drew v. Lockett*, 32 Beav. 499.

<sup>840</sup> *United States v. Ryder*, 110 U. S. 729, 4 Sup. Ct. 196, 28 L. Ed. 308.

<sup>841</sup> *In re Hewitt*, 25 N. J. Eq. 210.

<sup>842</sup> *United States v. Ryder*, 110 U. S. 729, 4 Sup. Ct. 196, 28 L. Ed. 308.

<sup>843</sup> *Jollet & C. R. Co. v. Healy*, 94 Ill. 416.

<sup>844</sup> *Green v. Milbank*, 3 Abb. N. C. (N. Y.) 138.

ceived thereafter by the creditor,<sup>845</sup> whether the surety had knowledge of such security,<sup>846</sup> or of his rights thereto.<sup>847</sup> If the security has been released, the surety's rights are not affected,<sup>848</sup> unless the rights of purchasers for value have intervened.<sup>849</sup> If any security has been relinquished by the creditor before the surety has paid the debt, he would be released to the extent of the value thereof.<sup>850</sup>

*Procedure to Enforce Right of Subrogation.*

To enforce the right of subrogation, a bill for that purpose is filed in a chancery court, making the creditor, the principal, and co-sureties,<sup>851</sup> if any, parties defendant; and it is not requisite that the surety shall have taken any previous action against the principal.<sup>852</sup>

*Right Lost by Waiver or Delay.*

Like other rights, that of subrogation may be waived, or lost by laches. If the surety delays until his right to indemnity is barred by the statute of limitations, subrogation will be denied him;<sup>853</sup> or the right may be lost in less time, if third persons, without knowledge of the suretyship, acquire liens in the property.<sup>854</sup>

<sup>845</sup> *Havens v. Willis*, 100 N. Y. 482, 3 N. E. 313; *Third Nat. Bank of Malone v. Shields*, 55 Hun. 274, 8 N. Y. Supp. 298; *Scanland v. Settle, Melgs* (Tenn.) 169; *Mitchell v. De Witt*, 25 Tex. Supp. 180, 78 Am. Dec. 561; *Brandon v. Brandon*, 3 De G. & J. 524.

<sup>846</sup> *Smith v. McLeod*, 38 N. C. 390; *Rice's Appeal*, 79 Pa. 168; *Kramer's Appeal*, 37 Pa. 71; *Hevener v. Berry*, 17 W. Va. 474; *Duncan v. Fox*, 6 App. Cas. 1.

<sup>847</sup> *Dempsey v. Bush*, 18 Ohio St. 376.

<sup>848</sup> *Atwood v. Vincent*, 17 Conn. 575; *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 430, 7 Am. Dec. 499; *Lichtenthaler v. Thompson*, 13 Serg. & R. (Pa.) 157, 15 Am. Dec. 581; *Drew v. Lockett*, 32 Beav. 499.

<sup>849</sup> *City Nat. Bank of Ottawa v. Dudgeon*, 65 Ill. 11.

<sup>850</sup> *Ante*, § 127.

<sup>851</sup> *BRINSON v. THOMAS*, 55 N. C. 414.

<sup>852</sup> *Irick v. Black*, 17 N. J. Eq. 189; *BITTICK v. WILKINS*, 7 Heisk. (Tenn.) 307.

<sup>853</sup> *Simpson v. McPhail*, 17 Ill. App. (17 Bradw.) 499; *Kreider v. Isenbice*, 123 Ind. 10, 23 N. E. 786; *Guild v. McDaniels*, 43 Kan. 548, 23 Pac. 607; *Joyce v. Joyce*, 1 Bush (Ky.) 474; *Rittenhouse v. Levering*, 6 Watts & S. (Pa.) 190; *Bank of Pennsylvania v. Potius*, 10 Watts (Pa.) 148; *Pickering v. Leiberman* (D. C.) 41 Fed. 376.

<sup>854</sup> *Smith v. Harbin*, 124 Ind. 434, 24 N. E. 1051; *Noble v. Turner*,

A surety's unsuccessful opposition to his principal's assignment for the benefit of creditors will not affect his right of subrogation to the rights of the creditor under the assignment.<sup>855</sup>

*Creditor's Right of Subrogation.*

We have been discussing, thus far, the right of a surety to be substituted to the rights of the creditor. The creditor, after his claim is due, has a right of subrogation to securities held by the surety,<sup>856</sup> provided they have been given to the surety by the principal. Such securities are regarded as a trust for better security, which a court of equity will enforce,<sup>857</sup> and

69 Md. 519, 16 Atl. 124; Searight's Estate, 163 Pa. 222, 29 Atl. 973; DOUGLASS' APPEAL, 48 Pa. 223.

<sup>855</sup> Motley v. Harris, 1 Lea (Tenn.) 577.

<sup>856</sup> Smith v. Gillam, 80 Ala. 296; Van Orden v. Durham, 35 Cal. 136; Lewis v. De Forest, 20 Conn. 427; Darst v. Bates, 51 Ill. 439; Griffiths v. First Nat. Bank (Ind. App. 1906) 79 N. E. 230; Rankin v. Wilsey, 17 Iowa, 463; Importers' & Traders' Bank v. McGhees, 88 Ga. 702, 16 S. E. 27; Selbert v. True, 8 Kan. 52; Moore v. Moberly, 46 Ky. (7 B. Mon.) 299; Steward v. Welch, 84 Me. 308, 24 Atl. 860; Baltimore & O. R. Co. v. Trimble, 51 Md. 114; Franklin County Nat. Bank v. Greenfield Bank, 138 Mass. 515; Rice v. Dewey, 13 Gray (Mass.) 47; Union Nat. Bank v. Rich, 106 Mich. 319, 64 N. W. 339; Butler v. Ladue, 12 Mich. 173; Tolle v. Boeckeler, 12 Mo. App. 54; Longfellow v. Barnard, 58 Neb. 612, 79 N. W. 255, 76 Am. St. Rep. 117; Barton v. Croydon, 63 N. H. 417; Demott v. Stockton, 32 N. J. Eq. 124; Merchants' & Manufacturers' Nat. Bank of Middletown v. Cummings, 149 N. Y. 360, 44 N. E. 173, affirming 79 Hun, 397, 29 N. Y. Supp. 782; National Bank of Newburgh v. Bigler, 83 N. Y. 51; Sherrod v. Dixon, 120 N. C. 60, 28 S. E. 770; Green v. Dodge, 6 Ohio (6 Ham.) 80, 25 Am. Dec. 736; Appeal of Mifflin County Nat. Bank, 98 Pa. 150; Cornwell's Appeal, 7 Watts & S. (Pa.) 305; Thompson v. Taylor, 12 R. I. 109; Walker v. Oglesby, 85 Tenn. 321, 3 S. W. 504; First Nat. Bank of Bellville v. Wheeler, 12 Tex. Civ. App. 489, 33 S. W. 1093; Morrill v. Morrill, 53 Vt. 74, 38 Am. Rep. 659; Bank of Virginia v. Boisseau, 12 Leigh (Va.) 387; Branch v. Railroad Co., 2 Woods, 385, Fed. Cas. No. 1,808. Contra, In re WALKER, [1892] 1 Ch. 621; ROYAL BANK v. COMMERCIAL BANK, L. R. 7 App. Cas. 366. If a guarantor takes security from the principal, it inures to the benefit of the creditor. Barton v. Martin, 54 Mo. App. 134. So as to securities taken by an indorser. Updegraff v. Edwards, 45 Iowa, 513; Boyd v. Parker, 43 Md. 183; Potter v. Stevens, 40 Mo. 229; Harmony Nat. Bank's Appeal, 101 Pa. 428; Kelley v. Whitney, 45 Wis. 110, 30 Am. Rep. 697.

<sup>857</sup> Daniel v. Hunt, 77 Ala. 567; Stearns v. Bates, 46 Conn. 806;



appropriate the property directly to the payment of the debt.<sup>888</sup> Thus, the creditor is entitled to the benefit of a judgment confessed by the principal in favor of the surety.<sup>889</sup>

*No Subrogation to Security Given for Other Purposes.*

It is essential that the security be given for the identical indebtedness due; and the creditor cannot obtain any greater rights than those possessed by the surety.<sup>890</sup> While, ordinarily, the creditor is not required to obtain a judgment before seeking subrogation,<sup>891</sup> he cannot enforce a mortgage given to a surety to protect the latter in event only of a judgment being obtained against the latter;<sup>892</sup> nor can he enforce any security which has been given on a contingency, unless such contingency has arisen.<sup>893</sup>

*Effect of Release of Securities by Surety.*

The surety has no right to release any securities which the principal has given to him, if the latter be insolvent;<sup>894</sup> and,

*Chambers v. Prewitt*, 172 Ill. 615, 50 N. E. 145; *Plaut v. Storey*, 131 Ind. 46, 30 N. E. 886; *In re Fickett*, 72 Me. 266; *Owens v. Miller*, 29 Md. 144; *Aldrich v. Blake*, 134 Mass. 584; *Thornton v. Exchange Bank*, 71 Mo. 221; *Richards v. Yoder*, 10 Neb. 429, 6 N. W. 629; *Price v. Trusdell*, 28 N. J. Eq. 200; *VAIL v. FOSTER*, 4 N. Y. (4 Comst.) 312; *Bank of Auburn v. Throop*, 18 Johns. (N. Y.) 505; *Long v. Miller*, 93 N. C. 227; *Rice's Appeal*, 79 Pa. 168; *Paris v. Hulett*, 26 Vt. 308; *Roberts v. Colvin*, 3 Grat. (Va.) 358.

<sup>888</sup> *Constant v. Matteson*, 22 Ill. 456. A surety must account to the creditor for the proceeds of a note given to him. *State ex rel. Bobb v. Bergfeld*, 108 Mo. App. 630, 84 S. W. 177.

<sup>889</sup> *Crosby v. Crafts*, 5 Hun (N. Y.) 327.

<sup>890</sup> *SUMNER v. BACHELDER*, 30 Me. 35. A discharge of the surety in any mode deprives the creditor of all claim to security given by the principal to the surety. *Russell v. La Roque*, 13 Ala. 149; *Van Orden v. Durham*, 35 Cal. 136; *Constant v. Matteson*, 22 Ill. 546; *Rankin v. Wilsey*, 17 Iowa, 463; *Tilford v. James*, 7 B. Mon. (Ky.) 336; *City of Albany v. Andrews*, 29 App. Div. 20, 52 N. Y. Supp. 1129; *Sherrod v. Dixon*, 120 N. C. 60, 28 S. E. 770; *Schmels v. Rix*, 95 Va. 509, 28 S. E. 890.

<sup>891</sup> *Importers' & Traders' Bank v. McGhees*, 88 Ga. 702, 16 S. E. 27; *Ohio Life Ins. & Trust Co. v. Reeder*, 18 Ohio, 35.

<sup>892</sup> *Bush v. Stamps*, 26 Miss. 463.

<sup>893</sup> *Pool v. Doster*, 59 Miss. 258.

<sup>894</sup> *Dyer v. Jacoway*, 76 Ark. 171, 88 S. W. 901; *JONES v. QUIN- NIPIACK BANK*, 29 Conn. 25.

if he does, the creditor's lien is not lost,<sup>866</sup> unless strangers, for value and without notice, acquire interests in such property.

*No Subrogation to Security by Stranger.*

The right of the creditor to subrogation is confined to security given to the surety by the principal.<sup>866</sup> Where it is given by a third person, or by a co-surety,<sup>867</sup> it is evident that a trust cannot attach,<sup>868</sup> as would be the case with the principal's own property; and, while the principal, in giving his own property to the surety, might be considered as pledging it for his debt, the act of a stranger cannot be considered in that light. Thus, where the wife of the principal, wishing to protect a surety against a possible loss arising through the husband, gives the surety her own property as security, such security cannot be reached by the creditor.<sup>869</sup>

*Right of Subrogation Not Affected by Statute of Limitations or by Statute of Frauds.*

The creditor will have the right of subrogation, although, on account of the statute of limitations,<sup>870</sup> or of the statute of frauds,<sup>871</sup> he could not have recovered from the surety. By seeking subrogation, the creditor does not seek to hold the surety personally, but to have him declared a trustee of the property of the principal in his possession.

However, the creditor, by his acts, may waive his rights to subrogation.<sup>872</sup>

<sup>866</sup> *McCracken v. German Ins. Co.*, 43 Md. 471; *Eastman v. Foster*, 8 Metc. (Mass.) 19.

<sup>866</sup> *Black v. Kaiser*, 91 Ky. 422, 16 S. W. 89; *O'Neill v. State Sav. Bank* (Mont. 1906) 87 Pac. 970; *Leggett v. McClelland*, 39 Ohio St. 624.

<sup>867</sup> *Seward v. Huntington*, 94 N. Y. 104; *Id.*, 26 Hun, 217; *HAMP- TON v. PHIPPS*, 108 U. S. 260, 2 Sup. Ct. 622, 27 L. Ed. 719.

<sup>868</sup> *Macklin v. Northern Bank*, 83 Ky. 314.

<sup>869</sup> *Taylor v. Farmers' Bank*, 87 Ky. 398, 9 S. W. 240.

<sup>870</sup> *Eastman v. Foster*, 8 Metc. (Mass.) 19; *Long v. Miller*, 93 N. C. 227.

<sup>871</sup> *Jack v. Morrison*, 48 Pa. 113. In *Helm's Adm'r v. Young*, 9 B. Mon. (Ky.) 394, subrogation was allowed, although the surety had been discharged by an extension of time given to the principal.

<sup>872</sup> *Franklin County Nat. Bank v. First Bank*, 138 Mass. 515; *New Bedford Inst. for Savings v. Fairhaven Bank*, 9 Allen (Mass.) 175; *Ex parte MORRIS*, 2 Lowell (U. S.) 424, Fed. Cas. No. 9,823.

## CHAPTER VI.

### RIGHTS AND LIABILITIES OF THE SURETY AND OF THE PRINCIPAL AS TO EACH OTHER.

- 153-155. Surety's Right to Indemnity.
- 156-158. Proceedings to Enforce Indemnity.
- 159. Principal's Defenses against Surety.
- 160. Amount Recoverable by Surety.
- 161. Surety's Application of Security.

### PRINCIPAL'S LIABILITY TO INDEMNIFY SURETY—BEGINNING OF.

153. As soon as a person has become liable as a surety, the law implies a promise by the principal to indemnify him for any payments which he is compelled to make on account of such relation; but such implied promise may be superseded by an express one.

### PRINCIPAL'S LIABILITY TO INDEMNIFY SURETY—WHEN FIXED.

154. As soon as the debt is due, the surety can pay the same, or a part of it, without any express request to do so, and, upon such payment, is entitled immediately to receive from the principal the amount so paid, or, if there be more than one principal, from any one or all of them; and this right is not affected by the fact that the surety holds security for his protection.

### WHAT CONSTITUTES PAYMENT.

155. Anything which is taken by the creditor in extinguishment of the debt will be regarded as payment.

#### *Implied Promise of Indemnity.*

Having considered the rights and liabilities of the creditor and surety with respect to each other, it is the intention now to treat of the rights and liabilities as between the surety and principal. The chief right which a surety possesses

against his principal is that of indemnity. At the very instant the relation of principal and surety arises,<sup>1</sup> the law implies a promise<sup>2</sup> by the principal to the surety to reimburse him for all direct damage<sup>3</sup> which the latter may sustain by reason of such relation;<sup>4</sup> the consideration for such promise being the liability incurred by the surety.<sup>5</sup> Originally the surety's remedy was in equity only, but in modern times very many equitable principles have been adopted by common law courts.<sup>6</sup>

This right of action arises out of the contract between the surety and the creditor, but is not based upon it;<sup>7</sup> and for this reason the principal is liable to the surety, whether or not

<sup>1</sup> *Ramsay's Estate v. Whitbeck*, 183 Ill. 550, 56 N. E. 322; *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 480; *APPLETON v. BASCOM*, 3 Metc. (Mass.) 169; *Rice v. Southgate*, 16 Gray (Mass.) 142; *In re Stout* (D. C.) 109 Fed. 794, 6 Am. Bankr. Rep. 505.

<sup>2</sup> *Martin v. Ellerbe's Adm'r*, 70 Ala. 326; *Foster v. Balch* (Conn. 1907) 65 Atl. 574; *Dickerson v. Turner*, 15 Ind. 4; *Wilson v. Crawford*, 47 Iowa, 469; *Konitzky v. Meyer*, 49 N. Y. 571; *Holmes v. Weed*, 19 Barb. (N. Y.) 128; *DECKER v. POPE*, 1 Selw. N. P. (13th Ed.) 91.

<sup>3</sup> See post, § 160.

<sup>4</sup> *Dubberly v. Black*, 88 Ala. 193; *Ridgeway v. Potter*, 114 Ill. 457, 3 N. E. 91, 55 Am. Rep. 875; *Roberts v. Trust Co.*, 83 Ill. App. 463; *Hazelton v. Valentine*, 113 Mass. 472; *Conn v. Coburn*, 7 N. H. 368, 26 Am. Dec. 746; *Cornell v. Prescott*, 2 Barb. (N. Y.) 16; *Fritch v. Bank*, 191 Pa. 283, 43 Atl. 394; *LAYER v. NELSON*, 1 Vern. 456; *FORD v. STOBURIDGE*, Nelson, Ch. 24; 40 Cent. Dig. col. 2242. A guarantor is entitled to indemnity. *Cotton v. Alexander*, 32 Kan. 339, 4 Pac. 259; *Kimmel v. Lowe*, 28 Minn. 265, 9 N. W. 764. So is an accommodation indorser. *Burton v. Slaughter*, 26 Grat. (Va.) 914. And bail. *Simpson v. Robert*, 35 Ga. 180; *Adair v. Campbell*, 4 Bibb (Ky.) 13; *Reynolds v. Harral*, 2 Strob. (S. C.) 87. But in *United States v. Ryder*, 110 U. S. 729, 4 Sup. Ct. 196, 28 L. Ed. 308, it is said to be contrary to public policy to allow bail in criminal cases to recover indemnity from the principal. See post, § 159 (e). A surety is entitled to prove against a bankrupt principal's estate. *Ex parte TURQUAND* [1876] 3 Ch. D. 445; *Ex parte WOOD*, cited in 10 Ves. 415.

<sup>5</sup> *APPLETON v. BASCOM*, 3 Metc. (Mass.) 169; *Haseltine v. Guild*, 11 N. H. 390; *SCOT v. STEPHENSON*, 1 Lev. 71, 1 Sid. 89, 1 Keb. 346.

<sup>6</sup> *APPLETON v. BASCOM*, 3 Metc. (Mass.) 169.

<sup>7</sup> *Crosby v. Wyatt*, 23 Me. 156; *Peaslee v. Breed*, 10 N. H. 489, 34 Am. Dec. 178; *Marshall v. Hudson*, 9 Yerg. (Tenn.) 57; *Faires v. Cockerell*, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 523.

the principal executed the contract with the creditor.<sup>8</sup> It is the principal's duty to keep the surety from being called upon to pay;<sup>9</sup> and for this reason, if the principal should buy the property of the surety at a sale on execution against the latter on account of the debt, the purchase money is considered paid to the surety, and the principal is treated as holding the purchased property in trust for the surety.<sup>10</sup>

*Express Agreement as to Indemnity.*

Although the law implies a promise by the principal to the surety, this will be done only in the absence of an express contract to this effect.<sup>11</sup> It is competent for the principal, by express agreement with the surety, to enlarge, restrict,<sup>12</sup> or entirely take away the right of indemnity; but an express agreement will not be shown by the fact that the surety has received security. The presumption in such a case is that the security is in addition to the right of indemnity given by law, and an agreement that his remedy against the principal must be confined to it must be shown;<sup>13</sup> and any restriction of the rights given to the surety by law will be strictly construed.<sup>14</sup>

*Effect of Payment by Surety.*

The right of a surety to indemnity having arisen when he entered into the relation, payment by him merely fixes the amount of damages which he can recover from the principal under the implied agreement already in existence.<sup>15</sup>

<sup>8</sup> *Trustees v. Shelk*, 119 Ill. 579, 8 N. E. 189.

<sup>9</sup> *Ritenour v. Mathews*, 42 Ind. 7.

<sup>10</sup> *Madgett v. Fleenor*, 90 Ind. 517; *Greer v. Wintersmith*, 85 Ky. 516, 4 S. W. 232, 7 Am. St. Rep. 613; *Van Horne v. Everson*, 13 Barb. (N. Y.) 526; *Perry v. Yarbrough*, 3 Jones, Eq. (N. C.) 66.

<sup>11</sup> If a surety takes a bond of indemnity, the implied promise is excluded. *Roosevelt v. Mark*, 6 Johns. Ch. (N. Y.) 266; *Duncan v. Keiffer*, 3 Bin. (Pa.) 126; *Toussaint v. Martinnant*, 2 Durn. & E. 100. Though it is otherwise if the bond be given by a stranger. *Wesley Church v. Moore*, 10 Pa. 273.

<sup>12</sup> *Hill v. Wright*, 23 Ark. 530.

<sup>13</sup> *Cornwall v. Gould*, 4 Pick. (Mass.) 444. That the right of a co-surety to contribution is not affected by the fact that he holds security, see post, c. VII, note 40.

<sup>14</sup> *Thomas v. Liebke*, 81 Mo. 675, affirming 9 Mo. App. 424.

<sup>15</sup> *Miller v. Stout*, 5 Del. Ch. 262; *Covey v. Neff*, 63 Ind. 391; *Teberg*

*Right of Surety before Payment.*

The rule that the implied contract arises on the day the surety assumes responsibility, and not when he pays the debt, becomes important as to matters which occur between those two dates. As the liability of the principal to the surety arises at the time the latter enters into the relation, it follows that the surety is a creditor of the principal from that time,<sup>16</sup> and as a creditor, possesses certain rights, which otherwise he would not have. Being a creditor, there would be a consideration for a note,<sup>17</sup> a mortgage,<sup>18</sup> or a conveyance<sup>19</sup> given by the principal to the surety to secure the latter, which the principal could not revoke afterwards,<sup>20</sup> and which other creditors of the principal could not attack successfully,<sup>21</sup> although the surety has not paid anything on account of his liability. Likewise, the principal can confess judgment in favor of his surety;<sup>22</sup> and fraudulent conveyances made by the principal may be set aside by the surety,<sup>23</sup> although made before payment by the surety. The right of the principal to exemptions, such as the

v. Swenson, 32 Kan. 224, 4 Pac. 83; Williams v. Banks, 11 Md. 242; Pennington v. Seal, 49 Miss. 525; Thomas v. Liebke, 81 Mo. 675.

<sup>16</sup> Sargent v. Salmond, 27 Me. 539.

<sup>17</sup> Haseltine v. Guild, 11 N. H. 390.

<sup>18</sup> Pennington v. Woodall, 17 Ala. 685; Grimes v. Sherman, 25 Neb. 843, 41 N. W. 814; Lane v. Sleeper, 18 N. H. 209; Uhler v. Semple, 20 N. J. Eq. 288; Kramer v. Farmers' Bank, 15 Ohio, 253; Gilbert v. Vall, 60 Vt. 266, 14 Atl. 542.

<sup>19</sup> Phipps v. Mansfield, 62 Ga. 209.

<sup>20</sup> Mandigo v. Mandigo, 26 Mich. 349.

<sup>21</sup> Welsch v. Werschem, 92 Ill. 115; Kendall v. Baltis, 26 Mo. App. 411; Butler v. Birkey, 18 Ohio St. 514.

<sup>22</sup> Tunnell v. Jefferson, 5 Har. (Del.) 206; Miller v. Howry, 3 Pen. & W. (Pa.) 374, 24 Am. Dec. 320; Pringle v. Slizer, 2 Rich. (S. C.) 59.

<sup>23</sup> Bragg v. Patterson, 85 Ala. 233, 4 South. 716; Anderson v. Walton, 35 Ga. 202; Hatfield v. Merod, 82 Ill. 113; Choteau v. Jones, 11 Ill. 300, 50 Am. Dec. 460; Sargent v. Salmond, 27 Me. 539; Williams v. Banks, 11 Md. 198; Loughridge v. Bowland, 52 Miss. 546; Findlay's Ex'rs v. Bank, 2 McLean (U. S.) 44, Fed. Cas. No. 4,791. Contra, Williams v. Tipton, 5 Humph. (Tenn.) 66, 42 Am. Dec. 420. In a proceeding by the surety to set aside a fraudulent conveyance made by his principal, the holder of the legal title to the land is a necessary party. Kimball v. Greig, 47 Ala. 230. Regarding right of surety to set aside a fraudulent conveyance by a co-surety, see post, c. VI, note 36.

right of homestead, are determined by the law in force when the surety became his creditor; that is, at the time the surety entered into the relation.<sup>24</sup>

*Equitable Counterclaim by Surety.*

For the reason that the principal is considered the debtor of the surety from the time the relation is entered into, an insolvent principal will not be allowed to recover a debt due from the surety to him<sup>25</sup> without indemnifying the latter in some way; or the proceedings may be stayed until a reasonable time has elapsed to enable the exact liability to be determined.<sup>26</sup> Were the insolvent principal allowed to recover his claim from the surety, the surety would be without practical remedy when called upon to pay the debt to the creditor.<sup>27</sup> An assignee of the principal fares no better than the principal himself.<sup>28</sup> This right to an equitable counterclaim extends to funds of an insolvent principal in the hands of the surety, which the latter can retain,<sup>29</sup> and his possession will be constructive notice to every one of his rights therein.

While a surety, before payment, cannot set off his contingent liability against his principal,<sup>30</sup> he can set off, after payment, whatever he has paid;<sup>31</sup> but, if there are co-sure-

<sup>24</sup> *Keel v. Larkin*, 72 Ala. 493.

<sup>25</sup> *Tuscumbia Co. v. Rhodes*, 8 Ala. 206; *Merwin v. Austin*, 58 Conn. 22, 18 Atl. 1029, 7 L. R. A. 84; *Scott v. Timberlake*, 83 N. C. 382; *Barnes v. Barnes* (Va.) 56 S. E. 172.

<sup>26</sup> *Sims v. Wallace*, 6 B. Mon. (Ky.) 410; *RICHARDSON v. MERRITT*, 74 Minn. 354, 77 N. W. 234, 407, 938; *Scott v. Timberlake*, 83 N. C. 382; *Beaver v. Beaver*, 23 Pa. 167; *Ross v. McKinnay*, 2 Rawle (Pa.) 227; *Feazle v. Dillard*, 5 Leigh (Va.) 30; *Mattingly v. Sutton*, 19 W. Va. 19.

<sup>27</sup> *Abbey v. Van Campen*, Freem. Ch. (Miss.) 273.

<sup>28</sup> *Williams v. Helme*, 16 N. C. 151, 18 Am. Dec. 530.

<sup>29</sup> *Battle v. Hart*, 17 N. C. 31; *McKnight v. Bradley*, 10 Rich. Eq. (S. C.) 557. If a surety, who has paid his principal's debt, becomes administrator of the principal's estate, the estate being solvent, he may apply funds of the estate to the payment of the debt. *Bates v. Vary*, 40 Ala. 421. But a surety for a firm cannot apply firm funds to the satisfaction of an individual debt of one of its members, for whom, also, he is a surety. *Downing v. Linville*, 3 Bush (Ky.) 472.

<sup>30</sup> *Kinsey v. Ring*, 83 Wis. 536, 53 N. W. 842.

<sup>31</sup> *Merwin v. Austin*, 58 Conn. 22, 18 Atl. 1029, 7 L. R. A. 84; *MOR-*

ties, his right of set-off against an insolvent principal extends to the amount of his share only, to be ascertained by apportioning the entire amount paid among the solvent sureties.<sup>32</sup>

*True Relation Can Be Shown Orally.*

As the right of a surety to indemnity is based upon an implied contract arising out of the relation itself, and not on the instrument creating the relation, it is not necessary, for the assertion of the right, that the relation appear on the instrument; but the exact relation can be shown by oral testimony,<sup>33</sup> and this can be done even in contradiction of the relation stated in the instrument.<sup>34</sup> The instrument shows the contract of the creditor with the principal and surety merely, and is not the contract between the principal and the surety. As has been shown, the principal and surety may change their relation by subsequent dealings;<sup>35</sup> and, as it is not the duty of the surety to indemnify the principal,<sup>36</sup> the one appearing to be the principal can show that he is the surety,<sup>37</sup> or that one appearing to be a surety is jointly liable with him.<sup>38</sup>

*Surety Can Pay or Perform Without Request.*

The surety, having undertaken to pay the creditor, or that the principal will pay or perform, not only has the right to

GAN v. WORDELL, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 83; Brittain v. Quilet, 54 N. C. 328, 62 Am. Dec. 202; In re Baily's Estate, 156 Pa. 634, 27 Atl. 560, 22 L. R. A. 444; Barney v. Grover, 28 Vt. 391.

<sup>32</sup> COSGROVE v. McKASY, 65 Minn. 426, 68 N. W. 76; Wayland v. Tucker, 4 Grat. (Va.) 267, 50 Am. Dec. 76.

<sup>33</sup> Dickey's Representatives v. Rogers (La.) 7 Mart. (N. S.) 588; Peters v. Barnhill, 1 Hill (S. C.) 234.

<sup>34</sup> Apgar's Adm'rs v. Hiller, 24 N. J. Law, 812.

<sup>35</sup> Ante, § 68.

<sup>36</sup> Benjamin v. Ver Nooy, 36 App. Div. 581, 55 N. Y. Supp. 796. Continuing partners, who pay a debt assumed by them, cannot recover from a retired partner. Savage v. Putnam, 32 N. Y. 501. Where the creditor's agent, by direction of the creditor, becomes administrator of a debtor's estate, the administrator's sureties cannot be held liable by such creditor, as he himself, through his agent, is the principal on the bond. Moodie v. Penman, 3 Desaus. (S. C.) 482.

<sup>37</sup> Gray v. McDonald, 19 Wis. 213. One may show that he is a supplemental surety. Chapeze v. Young, 87 Ky. 476, 9 S. W. 399.

<sup>38</sup> Pollard v. Stanton, 5 Ala. 451; Mansfield v. Edwards, 136 Mass. 15, 49 Am. Rep. 1; Williams v. Glenn, 92 N. C. 253, 53 Am. Rep. 416.



pay the creditor when the time arrives for payment,<sup>39</sup> but it is his legal duty to do so without waiting for any request from the principal,<sup>40</sup> or asking for his permission.<sup>41</sup> The law implies a request from the principal; and the surety may pay, even if forbidden by the principal to do so.<sup>42</sup> The surety need not wait for demand to be made upon him, nor for suit to be brought by the creditor;<sup>43</sup> nor, if he be sued, need he notify the principal of that fact.<sup>44</sup> It was the duty of the principal to pay the debt, and save the surety harmless; and he is not in a position to complain if the surety has done what he himself ought to have done.

*Right of Action after Payment.*

As a general rule, the surety cannot maintain an action for indemnity until he has made payment,<sup>45</sup> although there is every probability that the principal will evade meeting the

<sup>39</sup> Partlow v. Lane, 3 B. Mon. (Ky.) 424, 39 Am. Dec. 473; Wells v. Mann, 45 N. Y. 327, 6 Am. Rep. 93; Wesley Church v. Moore, 10 Barr. (Pa.) 273; Baxter v. Moore, 5 Leigh (Va.) 219.

<sup>40</sup> Teberg v. Swenson, 32 Kan. 224, 4 Pac. 83; Hall v. Smith, 48 U. S. (5 How.) 96, 12 L. Ed. 66.

<sup>41</sup> Hazelton v. Valentine, 113 Mass. 472.

<sup>42</sup> BEAL v. BROWN, 13 Allen (Mass.) 114.

<sup>43</sup> Fishback v. Weaver, 34 Ark. 569; Odlin v. Greenleaf, 8 N. H. 270; Mauri v. Heffernan, 13 Johns. (N. Y.) 58.

<sup>44</sup> Williams v. Greer's Adm'rs, 4 Hayw. (Tenn.) 235.

<sup>45</sup> Lane v. Westmoreland, 79 Ala. 372; In re Hill's Estate, 67 Cal. 238, 7 Pac. 664; Jefferson v. Tunnell, 2 Del. Ch. 135; Bonham v. Galloway, 13 Ill. 68; Shepard v. Ogden, 3 Ill. (2 Scam.) 257; Stearns v. Irwin, 62 Ind. 558; Cotton v. Alexander, 32 Kan. 339, 4 Pac. 259; Forest v. Shores, 11 La. (Curry) 416; Ingalls v. Dennett, 6 Me. (6 Greenl.) 79; Nally v. Long, 56 Md. 567; Swift v. Crocker, 38 Mass. (21 Pick.) 241; Gardner v. Cleveland, 26 Mass. (9 Pick.) 334; Lee v. Wisner, 38 Mich. 82; Minick v. Huff, 41 Neb. 516, 59 N. W. 795; Pearson v. Parker, 3 N. H. 366; Coleman v. Lansing, 65 Barb. (N. Y.) 54; HODGES v. ARMSTRONG, 3 Dev. (N. C.) 253; Miller v. Howry, 3 Pen. & W. (Pa.) 374, 24 Am. Dec. 320; In re McConaghy's Estate, 37 Leg. Int. (Pa.) 486; Pond's Adm'rs v. Warner, 2 Vt. 532; Harper's Adm'r v. McVeigh's Adm'r, 82 Va. 751, 1 S. E. 193; Barth v. Graf, 101 Wis. 27, 76 N. W. 1100; Pigou v. French, Fed. Cas. No. 11,161, 1 Wash. C. C. 278; 40 Cent. Dig. col. 2227. Payment after action has been brought by the surety is not sufficient. Dennison v. Soper, 33 Iowa, 183. Surety's possession of a note is prima facie evidence of its payment by him. Landrum v. Brookshire, 1 Stew. (Ala.) 252; Reynolds v. Skelton, 2 Tex. 516.

obligation;<sup>46</sup> but the principal, by express agreement, may give the surety a right to bring suit before the latter has made payment.<sup>47</sup> This would be the case if the principal has agreed to save the surety harmless.<sup>48</sup>

Payment may be made by agent; and this agency may arise from subsequent ratification of payment made by another whom the surety reimburses.<sup>49</sup>

*Surety No Right of Action until Maturity.*

The surety may pay the debt at any time, whether due or not, if the creditor is willing to accept payment; but he cannot bring suit against the principal for indemnity until the maturity of the debt.<sup>50</sup>

*Two or More Principals.*

If there are two or more principals, the surety can recover the full amount from all or any of them,<sup>51</sup> leaving them to adjust their respective liabilities later; and, if one of the principals be dead, the surety can recover the entire amount from his estate.<sup>52</sup>

<sup>46</sup> Buford v. Francisco, 3 Dana (Ky.) 68.

<sup>47</sup> Hall v. Nash, 10 Mich. 303; Dorrington v. Minnick, 15 Neb. 397, 19 N. W. 456; Port v. Jackson, 17 Johns. (N. Y.) 239; Wilson v. Stilwell, 9 Ohio St. 470, 75 Am. Dec. 477; LOOSEMORE v. RADFORD, 9 Mees. & W. 657.

<sup>48</sup> Lathrop v. Atwood, 21 Conn. 117; Malott v. Goff, 96 Ind. 496; Baldwin v. Emery, 89 Me. 496, 36 Atl. 994; Rice v. Sanders, 152 Mass. 108, 24 N. E. 1079, 8 L. R. A. 315, 23 Am. St. Rep. 804; Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341; Sparkman v. Gove, 44 N. J. Law, 252; Belloni v. Freeborn, 63 N. Y. 383; Powell v. Smith, 8 Johns. (N. Y.) 249; Fletcher v. Edson, 8 Vt. 294, 30 Am. Dec. 470; Lethbridge v. Mytton, 2 B. & Ad. 772.

<sup>49</sup> Harper's Adm'r v. McVeigh's Adm'r, 82 Va. 751, 1 S. E. 193.

<sup>50</sup> Golsen v. Brand, 75 Ill. 148; Ross v. Menefee, 125 Ind. 432, 25 N. E. 545; Dennison v. Soper, 33 Iowa, 183; Tillotson v. Rose, 11 Metc. (Mass.) 299; Felton v. Bissel, 25 Minn. 20; Barber v. Gilson, 18 Nev. 89, 1 Pac. 452; Armstrong v. Gilchrist, 2 Johns. Cas. (N. Y.) 424; William's Adm'r v. William's Adm'r's, 5 Ohio, 444; Craig v. Craig, 5 Rawle (Pa.) 91.

<sup>51</sup> Bunce v. Kirby (Conn.) 137; Dickey's Representatives v. Rogers, 7 Mart. (N. S., La.) 588; Overton v. Woodson, 17 Mo. 453; Riddle v. Bowman, 27 N. H. 236; Apgar's Adm'r's v. Hiler, 24 N. J. Law, 812; Westcott v. King, 14 Barb. (N. Y.) 32; Clay v. Severance, 55 Vt. 300.

<sup>52</sup> West v. Bank of Rutland, 19 Vt. 403.

The mere fact that a principal is jointly liable with others for the debt will not give the surety any rights against such others, if they are not actual parties to the contract,<sup>53</sup> though, if a partner give his individual note for a firm debt, a surety on the note can recover from all the partners.<sup>54</sup>

*What Constitutes Payment.*

It is not necessary that such payment be the voluntary act of the surety. It may be involuntary, as where his property is sold on execution;<sup>55</sup> nor need it be in money. Whatever extinguishes the debt,<sup>56</sup> or is accepted by the creditor as payment, will be sufficient.<sup>57</sup> Thus, it may be in property,<sup>58</sup> or it may be by the surety's negotiable promissory note.<sup>59</sup> Ne-

<sup>53</sup> *Bowman v. Blodgett*, 2 Metc. (Mass.) 308; *Cunningham v. Clarkson*, Wright (Ohio) 217; *OSBORN v. CUNNINGHAM*, 20 N. C. 559.

<sup>54</sup> *BURNS v. PARISH*, 3 B. Mon. (Ky.) 8; *McKee v. Hamilton*, 88 Ohio St. 7; *Weaver v. Tapscott*, 9 Leigh (Va.) 424. In some cases it is held that, where the instrument entered into by one partner is under seal, a surety thereon cannot recover from the other partners, although the bond was given for the benefit of the firm. *TOM v. GOODRICH*, 2 Johns. (N. Y.) 213; *Moore v. Stevens*, 60 Miss. 809; *Krafts v. Creighton*, 3 Rich. Law (S. C.) 273.

<sup>55</sup> *Clemens v. Prout*, 3 Stew. & P. (Ala.) 345; *Bonney v. Seely*, 2 Wend. (N. Y.) 481; *Hulett v. Soullard*, 26 Vt. 295.

<sup>56</sup> *BURNS v. PARISH*, 3 B. Mon. (Ky.) 8.

<sup>57</sup> *Hommell v. Gamewell*, 5 Blackf. (Ind.) 5; *Crozler's Trustees v. Grayson*, 4 J. J. Marsh. (Ky.) 514; *Barber v. Gillson*, 18 Nev. 89, 1 Pac. 452; *Lord v. Staples*, 23 N. H. 448; *Bonney v. Seely*, 2 Wend. (N. Y.) 481; *Ainslie v. Wilson*, 7 Cow. 662, 17 Am. Dec. 532; *Hulett v. Soullard*, 26 Vt. 295; *McVicar v. Royce*, 17 Up. Can. Q. B. 529; *Rodgers v. Maw*, 15 Mees. & W. 444.

<sup>58</sup> *Randall v. Rich*, 11 Mass. 494; *Ainslie v. Wilson*, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532; *Bonney v. Seely*, 2 Wend. (N. Y.) 481.

<sup>59</sup> *Knighton v. Curry*, 62 Ala. 404; *Neale v. Newland*, 4 Ark. (4 Pike) 506, 38 Am. Dec. 42; *Stanley v. McElrath*, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545; *Mims v. McDowell*, 4 Ga. 182; *Keller v. Boatman*, 49 Ind. 104; *Sapp v. Alken*, 68 Iowa, 699, 23 N. W. 24; *Rizer v. Callen*, 27 Kan. 339; *Stubbins v. Mitchell*, 82 Ky. 535; *Day v. Stickney*, 96 Mass. (14 Allen) 235; *Doolittle v. Dwight*, 2 Metc. (Mass.) 561; *Bausman v. Credit Guarantee Co.*, 47 Minn. 377, 50 N. W. 496; *Pearson v. Parker*, 3 N. H. 366; *Howe v. Railroad Co.*, 37 N. Y. 297, affirming 38 Barb. (N. Y.) 124; *Witherby v. Mann*, 11 Johns. (N. Y.) 518; *Craig v. Craig*, 5 Rawle (Pa.) 91; *Peters v. Barnhill*, 1 Hill (S. C.) 237; *BARCLAY v. GOOCH*, 2 Esp. 571; 40 Cent. Dig. col. 2266. The surety must show that the note was taken as pay-

gotiable instruments, in law, play the part of money,<sup>60</sup> and giving a promissory note is, in most cases, equivalent to the payment of money, so far as bestowing upon the maker the rights which come from payment. It is immaterial that the note is not due,<sup>61</sup> or that it is due and unpaid, and that the maker is insolvent, or that the note cannot be collected.<sup>62</sup>

The fact that the surety has been imprisoned for the debt will not give him a right to indemnity,<sup>63</sup> unless such imprisonment has discharged the debt.

*Payment in Installments.*

A surety is not obliged to pay the entire debt before bringing suit for indemnity, but may recover for each installment

ment. *Lentell v. Getchell*, 59 Me. 135. Giving a nonnegotiable note is not regarded as payment, as such an instrument is not endowed with the qualities necessary for a circulating medium. *Pitzer v. Harmon*, 8 Blackf. (Ind.) 112, 44 Am. Dec. 738; *Cumming v. Hackley*, 8 Johns. (N. Y.) 202; *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398; *Brisendine v. Martin*, 23 N. C. 286; *Morrison v. Berkey*, 7 Serg. & R. (Pa.) 238; *Boulware v. Robinson*, 8 Tex. 327, 58 Am. Dec. 117; *Maxwell v. Jameson*, 2 B. & Ald. 51. For a similar rule as between co-sureties, see post, § 164.

This rule has been the subject of much criticism, for the reason that if, for any reason, the note of the surety is not paid, it results in the surety receiving and retaining money from the principal which belongs to the creditor, and violates the rule that a surety cannot speculate upon the principal. See *Stearns, Law of Suretyship*, p. 546; but these criticisms overlook the fact that if the surety had borrowed money from a third party, giving his note therefor, and had paid the money to the creditor, there would be no question about the right of the surety to recover from the principal, though the transaction would be equally fraudulent, or if the surety had paid cash to the creditor, who then reloaned it to the surety, the result would be the same as giving his note originally. It certainly is not for the principal, who has not performed his legal duty, to complain of subsequent negotiations which are mutually satisfactory to the creditor and surety, and which extinguish the debt, and to insist upon the surety waiting until the second note is paid before resorting to him, at which time he may have become insolvent. When the creditor takes property of any kind, he runs the risk of its depreciation.

<sup>60</sup> Norton, *Bills and Notes* (3d Ed.) p. 17.

<sup>61</sup> *Auerbach v. Rogin*, 40 Misc. Rep. 695, 83 N. Y. Supp. 154.

<sup>62</sup> *Hardin v. Branner*, 25 Iowa, 364.

<sup>63</sup> *Powell v. Smith*, 8 Johns. (N. Y.) 249.

as paid.<sup>64</sup> This is not splitting up a cause of action as the surety's suit is not on the contract with the creditor, but upon the contract which the law implies. The surety's right to indemnity is complete as soon as he has made payment, and the principal is not in a position to complain. If he is inconvenienced by several suits being brought, he should have paid the debt, as it was his legal duty to do, or promptly reimburse his surety, when the latter has done what he should have done.

*Joint Debtors.*

If A., B., and C. were to sign a joint note for \$3,000, each receiving \$1,000, each is a principal for the amount he has received, and surety for the other two.<sup>65</sup> If, when the note is due, A. should pay the entire amount, he would be entitled to recover one-third from each of his principals.

*Supplemental Sureties.*

A supplemental surety, who has paid the debt, can recover from a surety,<sup>66</sup> as well as from the principal, as all prior parties are principals to him. A guarantor<sup>67</sup> of the payment of a note, or an indorser, is a supplemental surety for the sureties who have signed as makers with the principal; they being sureties in the narrower sense of the word.

As has been explained before, in successive appeal bonds, all those who became sureties before the last bond was given occupy the position of supplemental sureties,<sup>68</sup> and can recover

<sup>64</sup> *Ritenour v. Mathews*, 42 Ind. 7; *Wilson v. Crawford*, 47 Iowa, 469; *Pickett v. Bates*, 3 La. Ann. 627; *Bullock v. Campbell*, 9 Gill (Md.) 182; *William's Adm'rs v. William's Adm'rs*, 5 Ohio, 444; *Hall v. Hall*, 29 Tenn. (10 Humph.) 352; *Davies v. Humphreys*, 6 Mees. & W. 153. See, also, *Ex parte WOOD*, cited in 10 Ves. 415. Possibly, in a case where the surety is acting maliciously, he might be compelled to unite all of his claims in one suit.

<sup>65</sup> See ante, c. I, note 66.

<sup>66</sup> *Hamilton v. Johnston*, 82 Ill. 39; *Paul v. Berry*, 78 Ill. 158; *Chapeze v. Young*, 87 Ky. 476, 9 S. W. 399; *SHERMAN v. BLACK*, 49 Vt. 198; *McDonald v. Magruder*, 3 Pet. (U. S.) 470, 7 L. Ed. 744; *Craythorne v. Swinburne*, 14 Ves. 164. An accommodation acceptor for the drawer and his sureties can recover from the latter. *Dickerson v. Turner*, 15 Ind. 4.

<sup>67</sup> *Second Nat. Bank v. Diefendorf*, 90 Ill. 396; *Hamilton v. Johnston*, 82 Ill. 39.

<sup>68</sup> See ante, c. V, note 638.

indemnity from any surety or set of sureties who became such at a later date than the one who has paid.

**NOTICE TO AND DEMAND ON PRINCIPAL UNNECESSARY.**

**156. The surety, if entitled to recover from the principal, can bring suit without giving him previous notice or making demand of him.**

**JOINT ACTION BY CO-SURETIES.**

**157. If two or more sureties have paid the debt, they cannot join as plaintiffs against the principal, unless they have paid from a joint fund.**

**ACTION ON ORIGINAL INSTRUMENT.**

**158. Suit may be brought upon the implied promise, or upon the principal's contract with the creditor, if such contract is within the control of the surety.**

*Notice to or Demand of Principal Not Necessary.*

As soon as a surety has paid his principal's debt,<sup>69</sup> it being due, he can bring suit against the principal without previous notice<sup>70</sup> or demand,<sup>71</sup> as it is the principal's duty to take notice that the surety has been damnified by a failure to perform his contract.<sup>72</sup> The right of action arises when the surety not only has dealt directly with the creditor, but when he has contributed his share to another surety who has satisfied the debt.<sup>73</sup> However, one co-surety, paying the whole debt, can maintain an action against the principal for the entire amount without molesting the others.<sup>74</sup>

<sup>69</sup> *Ritenour v. Mathews*, 42 Ind. 7; *Conn v. Coburn*, 7 N. H. 368, 26 Am. Dec. 746.

<sup>70</sup> *Slkes v. Quick*, 52 N. C. 19.

<sup>71</sup> *Collins v. Boyd*, 14 Ala. 505; *Odlin v. Greenleaf*, 3 N. H. 270; *William's Adm'rs v. William's Adm'rs*, 5 Ohio (5 Ham.) 444.

<sup>72</sup> *Ward v. Henry*, 5 Conn. 595, 13 Am. Dec. 119; *Thompson v. Wilson's Ex'r*, 13 La. 138.

<sup>73</sup> *Odlin v. Greenleaf*, 3 N. H. 270.

<sup>74</sup> *Lowry v. Lumbermen's Bank*, 2 Watts & S. (Pa.) 210.

*Parties Plaintiff.*

Where each of two or more sureties has paid part of the debt, as a general rule they must bring separate actions against the principal,<sup>75</sup> as the promise implied by law is between the principal and the person paying; but they can join as plaintiffs where payment has been made from a joint fund.<sup>76</sup> Payment will be deemed to have been made from a joint fund where sureties are liable as partners and have paid with partnership funds,<sup>77</sup> or where the sureties have joined in signing a note which is given in payment of the debt,<sup>78</sup> or they have paid as the heirs of a surety.<sup>79</sup>

*Cause of Action.*

The surety may satisfy the creditor's claim, and bring an action of assumpsit for money paid at the principal's request;<sup>80</sup>

<sup>75</sup> *Parker v. Leek*, 1 Stew. (Ala.) 523; *Whitbeck v. Ramsay's Estate*, 74 Ill. App. 524; *Sevier v. Roddie*, 51 Mo. 580; *Peabody v. Chapman*, 20 N. H. 418; *Gould v. Gould*, 8 Cow. (N. Y.) 168; *Doremus v. Selden*, 19 Johns. (N. Y.) 213; *Boggs v. Curtin*, 10 Serg. & R. (Pa.) 211; *Newnan v. Campbell*, 8 Tenn. (Mart. & Y.) 63; *Prescott v. Newell*, 39 Vt. 82; *Brand v. Boulcott*, 3 Bos. & P. 235. For a similar rule, when two or more co-sureties seek contribution, see post, § 168.

<sup>76</sup> *Dussol v. Brugulere*, 50 Cal. 456; *Jewett v. Cornforth*, 3 Me. 107; *APPLETON v. BASCOM*, 3 Metc. (Mass.) 169; *Clapp v. Rice*, 15 Gray (Mass.) 557, 77 Am. Dec. 387; *Bates v. Merrick*, 2 Hun (N. Y.) 568; *Commonwealth v. Cox's Adm'r*, 36 Pa. 442; *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. Dec. 98. The presumption is that sureties have paid individually, and not jointly. *Lombard v. Cobb*, 14 Me. (2 Shep.) 222.

<sup>77</sup> *Day v. Swann*, 13 Me. 165. An executor of a deceased partner cannot join with the surviving partner in a suit for indemnity. *Gould v. Gould*, 8 Cow. (N. Y.) 168.

<sup>78</sup> *Ross v. Allen*, 67 Ill. 317; *Rizer v. Callen*, 27 Kan. 339; *Doolittle v. Dwight*, 43 Mass. (2 Metc.) 561; *Pearson v. Parker*, 3 N. H. 366.

<sup>79</sup> *Snider v. Greathouse*, 16 Ark. 72, 63 Am. Dec. 54.

<sup>80</sup> *Ward v. Henry*, 5 Conn. 595, 13 Am. Dec. 119; *Junker v. Rush*, 136 Ill. 179, 26 N. E. 499, 11 L. R. A. 183; *Landsdale's Adm'r v. Cox*, 23 Ky. (7 T. B. Mon.) 401; *Smith v. Sayward*, 5 Me. (5 Greenl.) 504; *APPLETON v. BASCOM*, 3 Metc. (Mass.) 169; *Gibbs v. Bryant*, 18 Mass. (1 Pick.) 118; *Pearson v. Parker*, 3 N. H. 366; *Ainslie v. Wilson*, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532; *Powell v. Smith*, 8 Johns. (N. Y.) 249; *Gray v. Bowls*, 18 N. C. 437; *Hill v. Voorhies*, 22 Pa. (10 Harris) 68; *Hassinger v. Solms*, 5 Serg. & R. (Pa.) 4; *McWilliams v. Willis*, 1 Wash. (Va.) 199; 40 Cent. Dig. col. 2282.

or, in some cases, he may take an assignment of the claim, and bring an action thereon.<sup>81</sup> If the creditor's claim has been reduced to a judgment, the surety can have the judgment kept alive for his benefit.<sup>82</sup> The advantage of bringing suit upon the implied promise is that the surety can recover, not only the amount of the creditor's claim, but all reasonable costs incurred by the surety.<sup>83</sup> The advantage of bringing suit upon the original contract between the principal and the creditor is that the statute of limitations would run longer on the written contract than on the implied one,<sup>84</sup> thus enabling suit to be brought after the implied contract was barred, or that he would obtain a priority that otherwise he would not have. Where a surety has the right to purchase the negotiable paper upon which he is liable with another, and he does so for less than its face value, he might recover the face value from the principal,<sup>85</sup> while he could recover upon the implied promise the

<sup>81</sup> See ante, c. V, note 835. See post, § 170, as to suit on original instrument in enforcing contribution from co-sureties.

<sup>82</sup> *Harris v. Frank*, 29 Kan. 200; *Harper v. Kemble*, 65 Mo. App. 514; *Nelson v. Webster* (Neb. 1904) 100 N. W. 411, 68 L. R. A. 513; *NEAL v. NASH*, 23 Ohio St. 483; *HILL v. KING*, 48 Ohio St. 75, 26 N. E. 988. A surety can take an assignment of a judgment against the principal alone. *Harger v. McCullough*, 2 Denio (N. Y.) 119. In some states the surety's remedy is in a court of equity only. *Knight v. Morrison*, 79 Ga. 55, 3 S. E. 689, 11 Am. St. Rep. 405; *Crisfield v. State*, 55 Md. 192. The surety can have the judgment assigned to a third person, and enforced for his benefit. *Katz v. Moessinger*, 110 Ill. 372; *Ferguson v. Carson*, 13 Mo. App. 29, affirmed 86 Mo. 673; *HODGES v. ARMSTRONG*, 14 N. C. 253.

<sup>83</sup> *Burton v. Stewart*, 62 Barb. (N. Y.) 194.

<sup>84</sup> See ante, c. V, note 837.

<sup>85</sup> *FOWLER v. STRICKLAND*, 107 Mass. 552; *Blow v. Maynard*, 2 Leigh (Va.) 29. After a surety has paid a note, he cannot put it in circulation against the principal. *PRAY v. MAINE*, 7 Cush. (Mass.) 253. Nor has he the rights of a holder. *Swem v. Newell*, 19 Colo. 397, 35 Pac. 734; *Dillenbeck v. Dygert*, 97 N. Y. 303, 49 Am. Rep. 525. In *HARRAH v. JACOBS*, 75 Iowa, 72, 39 N. W. 187, 1 L. R. A. 152, it was held that a surety cannot enforce a note on which he and the principal were joint makers; but in *WALDRIP v. BLACK*, 74 Cal. 409, 16 Pac. 226, it was said that a surety, upon payment, became the equitable assignee of the note, and entitled to enforce it.



amount which he had paid only.<sup>86</sup> Hence a surety should govern his action according to circumstances.

A judgment against the surety is prima facie evidence against the principal,<sup>87</sup> and it will be conclusive if the principal have notice of the suit against the surety, or if the two were sued jointly.<sup>88</sup>

#### PRINCIPAL'S DEFENSES.

159. The surety, having paid the debt, cannot recover from the principal if—

- (a) The surety entered into the relation without the principal's request.
- (b) The principal lacked capacity to make the contract.
- (c) The surety's payment was voluntary.
- (d) The agreement between the surety and the principal was illegal.
- (e) Recovery would be contrary to public policy.
- (f) The surety has been paid.
- (g) The principal has been discharged in bankruptcy.
- (h) The surety's claim has been barred.

#### *Suretyship without Principal's Knowledge.*

As has been said, when a surety enters into his contract, the law implies a request from the principal to pay the debt when due, and a promise to reimburse the surety for all sums necessarily paid out by him.<sup>89</sup> It follows, from this, that no such request or promise can be implied if a person become a surety without the knowledge of the principal.<sup>90</sup> The law cannot imply a promise by the principal to reimburse some one

<sup>86</sup> See post, § 160.

<sup>87</sup> *Chipman v. Fambro*, 16 Ark. 291; *Dewitt v. Boring*, 123 Ind. 4, 23 N. E. 1085; *Reed v. Humphrey*, 69 Kan. 155, 76 Pac. 390; *Pitts v. Fugate*, 41 Mo. 405. A judgment rendered in favor of a surety against the principal without notice is not evidence in another state. *McNairy v. Bell*, 5 Rob. (La.) 418.

<sup>88</sup> *Dampskibsskieselskabet Habi v. Fidelity Co.* (Ala. 1905) 39 South. 54; *Rice v. Rice*, 14 B. Mon. (Ky.) 417; *Littleton v. Richardson*, 34 N. H. 179, 66 Am. Dec. 759; *Konitzky v. Meyer*, 49 N. Y. 571; *Hare v. Grant*, 77 N. C. 203. See note 148, *infra*.

<sup>89</sup> Ante, § 153.

<sup>90</sup> *King v. Hannah*, 6 Ill. App. (6 Bradw.) 495; *McPherson v. Meek*, 30 Mo. 345; *White's Ex'r v. White*, 30 Vt. 338.

about whom he knows nothing. The principal has a right to choose his creditors; and a person who becomes a surety without the principal's knowledge is, as to the principal, the same as a stranger who pays the debt.<sup>91</sup> In such cases, the principal successfully may resist payment by saying that he did not promise. However, where there are two or more jointly liable, a request from one of them will be regarded as a request by all, and a surety could recover from any of them.<sup>92</sup>

It is not requisite that the surety become such at the express request of the principal. The law will imply a request whenever the principal seems to have authorized such security, or afterwards has recognized the relation by his acts.<sup>93</sup> Thus, where the principal appears in an appellate court, it will be inferred that a surety upon the appeal bond became such at the request of the principal.<sup>94</sup>

*Incapacity of Principal.*

When sued by the surety, the principal can defend successfully by showing his incapacity to enter into a contract. If the principal be an infant or an idiot, the surety cannot recover; nor could the surety recover from a corporation if the transaction was ultra vires.\* The defense of infancy cannot be maintained successfully against a surety if it could not be against the creditor,<sup>95</sup> as in the case of a guaranty of the payment of necessities furnished.<sup>96</sup>

It might be that, while the principal and surety each have capacity to contract with the creditor, they lack capacity to enter into contracts with each other. Thus, where a statute forbids contracts between husband and wife, the latter, as surety for her husband, cannot recover from him on an implied contract for indemnity.<sup>97</sup>

<sup>91</sup> CARTER v. BLACK, 20 N. C. 561.

<sup>92</sup> Hamilton v. Johnston, 82 Ill. 39.

<sup>93</sup> Ricketson v. Giles, 91 Ill. 154.

<sup>94</sup> Snell v. Warner, 63 Ill. 176.

\* For similar defense in action between co-sureties for contribution, see post, § 172 (a).

<sup>95</sup> Fagin v. Goggin, 12 R. I. 398.

<sup>96</sup> AYERS v. BURNS, 87 Ind. 245, 44 Am. Rep. 759; Conn v. Coburn, 7 N. H. 368, 26 Am. Dec. 746.

<sup>97</sup> Major v. Holmes, 124 Mass. 108.

*Voluntary Payments.*

A surety cannot recover from the principal if his payment was voluntary.<sup>98</sup> A voluntary payment is one made with knowledge of facts showing no legal liability. A surety, who pays a note void because given in a gambling transaction, cannot recover from the principal.<sup>99</sup> If a person making payment honestly supposes that he is legally liable,<sup>100</sup> the payment is, nevertheless, a voluntary one if he had knowledge of facts indicating lack of liability,<sup>101</sup> as ignorance of the law excuses no one; but payment of an enforceable judgment against the principal is not voluntary.<sup>102</sup> If, however, the surety, before or after suit is brought against him, pays in ignorance of the facts, he can recover from the principal,<sup>103</sup> unless he has been negligent.<sup>104</sup> If the facts were within the knowledge of the principal, he should have told the surety.<sup>105</sup> A payment is not voluntary because made without demand or suit,<sup>106</sup> if there was legal liability; nor is it voluntary if there is a legal liability, although the principal supposes there is none.<sup>107</sup> A part only of the payment made by the surety may be voluntary, as payment of usury with knowledge that it is such, where the creditor could not have collected the usury,<sup>108</sup> but the principal debt only.

<sup>98</sup> *Halsey v. Murray*, 112 Ala. 185, 20 South. 575; *Smith v. Staples*, 49 Conn. 87; *Hollinsbee v. Ritchey*, 49 Ind. 261; *Kimble v. Cummins*, 3 Metc. (Ky.) 327; *Hatchett v. Pegram*, 21 La. Ann. 722. And see post, § 172 (c), for similar defense in action for contribution from co-sureties.

<sup>99</sup> *Harley v. Stapleton's Adm'r*, 24 Mo. 248; *Davis v. Stokes County*, 74 N. C. 374.

<sup>100</sup> *Bancroft v. Abbott*, 3 Allen (Mass.) 524.

<sup>101</sup> *Sponhaur v. Malloy*, 21 Ind. App. 287, 52 N. E. 245.

<sup>102</sup> *Randolph's Adm'r v. Randolph*, 3 Rand. (Va.) 490.

<sup>103</sup> *Gasquet v. Oakey*, 19 La. 76; *Hyde v. Miller*, 45 App. Div. 396, 60 N. Y. Supp. 974.

<sup>104</sup> *Hichborn v. Fletcher*, 66 Me. 209, 22 Am. Rep. 562.

<sup>105</sup> *Stinson v. Brennan*, Cheves, Law (S. C.) 15.

<sup>106</sup> *Stallworth v. Preslar*, 34 Ala. 505; *Fishback v. Weaver*, 34 Ark. 569; *Judah v. Mleure*, 5 Blackf. (Ind.) 171; *Bond v. Bishop*, 18 La. Ann. 549; *Hichborn v. Fletcher*, 66 Me. 209, 22 Am. Rep. 562; *Odlin v. Greenleaf*, 3 N. H. 270; *Linn v. McClelland*, 20 N. C. 596; *Pitt v. Purssord*, 8 Mees. & W. 538.

<sup>107</sup> *Bancroft v. Pearce*, 27 Vt. 668.

<sup>108</sup> *Jones v. Joyner*, 8 Ga. 562.

While, as a general rule, whatever discharges the principal discharges the surety,<sup>109</sup> so that payment made by the surety in cases where the creditor cannot enforce the liability of the principal would be considered voluntary, it sometimes happens that the creditor can hold the surety after his right of action against the principal has been lost;<sup>110</sup> and the surety, upon his being compelled to pay, can recover from the principal notwithstanding the creditor could not recover from the latter.<sup>111</sup> Thus, owing to the absence of the surety in another state, the statute of limitations may have been suspended as to him, although the action is barred as to the principal, and the surety, upon payment, can recover indemnity. So a surety, after paying a co-surety his proportion of the indebtedness paid by the latter, can recover from the principal, although the claim of the payee was barred as to the principal.<sup>112</sup>

*Waiver of Personal Defenses by Surety Does Not Make Payment Voluntary.*

If a surety pays the debt after the debt is barred against both himself and the principal, he cannot recover from the principal;<sup>113</sup> though, if the debt is not barred against the principal, the surety can recover, though the debt was barred as to him.<sup>114</sup> As the defense of the statute of limitations is a personal one, the surety may waive it,<sup>115</sup> though he cannot waive it for the principal. Likewise, the surety can waive

<sup>109</sup> Ante, § 128.

<sup>110</sup> See ante, § 130.

<sup>111</sup> *McBroon v. Governor*, 6 Port. (Ala.) 32; *Reid v. Flippen*, 47 Ga. 273; *Gieseke v. Johnson*, 115 Ind. 308, 17 N. E. 573; *Reed v. Humphrey*, 69 Kan. 155, 76 Pac. 390; *Godfrey v. Rice*, 59 Me. 308; *Bullock v. Campbell*, 9 Gill (Md.) 182; *Barnsback v. Reiner*, 8 Minn. 59 (Gil. 37); *Scott v. Nichols*, 27 Miss. 94, 61 Am. Dec. 503; *Norton v. Hall*, 41 Vt. 471. Where the creditor does not present his claim against the estate of a deceased principal within the time designated by statute, a surety, paying the debt, may recover indemnity from the estate. *Hooks v. Branch Bank*, 8 Ala. 580; *Brought v. Griffith*, 16 Iowa, 26; *Miller v. Woodward*, 8 Mo. 169; *SIBLEY v. McALLASTER*, 8 N. H. 389; *Marshall v. Hudson*, 9 Yerg. (Tenn.) 57.

<sup>112</sup> *Odlin v. Greenleaf*, 3 N. H. 270.

<sup>113</sup> *STONE v. HAMMELL*, 83 Cal. 547, 23 Pac. 703, 8 L. R. A. 425, 17 Am. St. Rep. 272.

<sup>114</sup> *Shaw v. Loud*, 12 Mass. 447; *McClatchie v. Durham*, 44 Mich. 435, 7 N. W. 76.

<sup>115</sup> Ante, § 134.

the defense of the statute of frauds,<sup>116</sup> and pay a debt which could not be enforced against him because his promise was not evidenced in writing.<sup>117</sup> The statute of frauds was enacted for the benefit of the surety,<sup>118</sup> and not for the benefit of the principal. It does not make the contract void, and has no application to the implied contract of the principal to indemnify his surety. The same rule applies to an indorser of a negotiable instrument, who may waive his right to consider himself discharged on account of the failure of the holder to comply with the conditions in regard to presentment, demand, and notice; and, after payment, he can recover from the party primarily liable.<sup>119</sup> So, a surety may waive any personal defense, such as infancy, pay the debt, and recover from his principal the amount so paid.

The rule is, so long as the principal remains liable to the creditor, the surety may pay the debt and hold the principal, although the creditor could not enforce payment from the surety on account of defenses personal to the latter; but, if the surety actually has been released from legal liability, he cannot refuse to make a defense, and, by payment of the debt, hold the principal.<sup>120</sup>

#### *Illegal Contracts.*

Payment by a surety on a void contract, which could not be enforced by the creditor, would be a voluntary one; and such would be the case where the surety pays, knowing of facts showing the transaction to be illegal.<sup>121</sup> There are instances, however, where the contract with the creditor or obligee is perfectly legal and valid; but an express agreement entered

<sup>116</sup> Ante, § 90.

<sup>117</sup> *Godden v. Pierson*, 42 Ala. 370; *Ames v. Jackson*, 115 Mass. 512; *Cahill v. Bigelow*, 18 Pick. (Mass.) 369; *Lee v. Stowe*, 57 Tex. 444.

<sup>118</sup> *BEAL v. BROWN*, 18 Allen (Mass.) 114.

<sup>119</sup> *Stanley v. McElrath*, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545. In *SLEIGH v. SLEIGH*, 5 Exch. 514, it was held that an accommodation drawer, who had not received notice of dishonor, and who paid part of the bill without taking it up and without request from the acceptor, could not recover from the latter.

<sup>120</sup> *Spillman v. Smith*, 15 B. Mon. (Ky.) 134.

<sup>121</sup> See note 99, *supra*.

into between the principal and his sureties for the performance of some illegal act in connection with the position occupied by the principal prevents recovery by the surety from the principal, the law being that the courts will not lend their aid to parties to an unlawful agreement.<sup>123</sup> In such cases payment by sureties to the creditor or obligee cannot be said to be voluntary, as the creditor or obligee has not participated in the unlawful transaction, and can enforce the liability of the sureties. The sureties, though, cannot recover from the principal, if he choose to take advantage of the illegality. Where sureties signed the bond of a public officer upon the strength of his promise to loan the public funds improperly, and in such a way that they would receive the benefit of the loan, and the sureties are compelled to make good a default of the officer, they will not be permitted to recover anything from their principal.<sup>123</sup>

If the obligation itself is not invalid, it is no defense to the principal that the surety knew that it was given improperly. Thus, sureties on a replevin bond can recover from the principal, although the former knew that the replevin suit was without foundation.<sup>124</sup>

Where the illegality is unknown to the surety at the time of entering into the contract, and is of such a nature that it does not render the contract void, but the principal can waive it as a defense if he desires to do so, the surety, although he learns of the illegality before payment, can recover from the principal, unless the latter has notified the surety of his desire to avail himself of the defense. Such would be the case of a note tainted with usury.<sup>125</sup>

*Contracts Opposed to Public Policy.*

In some cases, on grounds of public policy, a surety will not be allowed to recover from the principal. Sureties on a bail bond in a criminal proceeding, who have been compelled

<sup>123</sup> Clark, Cont. (2d Ed.) p. 336.

<sup>123</sup> Ramsay's Estate v. Whitbeck, 183 Ill. 550, 56 N. E. 322.

<sup>124</sup> Smith v. Rines, 32 Me. 177. Where an appeal bond has been accepted, and the proceeding has been stayed by virtue of it, its validity cannot be questioned by the principal in an action by the sureties; he being estopped. Bates v. Merrick, 2 Hun (N. Y.) 568.

<sup>125</sup> Jones v. Joyner, 8 Ga. 562.

to pay on account of the failure of the accused to appear in accordance with the terms of the bond, can recover nothing from the principal, except costs which they have been compelled to pay.<sup>126</sup> To allow otherwise would be to permit the accused to purchase his freedom, and take away the incentive of the sureties to perform their obligation to have the principal appear. If they allow the accused to escape, they should suffer for their wrongdoing.

If, at the time the sureties entered upon their contract, the accused, or a third person, deposited money with them to indemnify against possible loss, and the accused is discharged afterwards, he cannot recover the money from the sureties, as such an arrangement was illegal.<sup>127</sup>

*Performance by Principal.*

When sued by the surety, the principal may show, in his defense, that he has performed his implied contract. If the surety has taken property from the principal in satisfaction of the liability incurred, nothing more can be recovered.<sup>128</sup> However, where one co-surety has paid the creditor, the principal cannot escape liability to him by showing payment to another co-surety,<sup>129</sup> though a supplemental surety might not be able to recover from the principal if the latter had paid the surety.<sup>130</sup>

*Bankruptcy of Principal.*

If the principal is discharged in insolvency<sup>131</sup> or in bankruptcy<sup>132</sup> after the surety has paid the debt, he cannot be held liable by the surety, unless the debt is one of the char-

<sup>126</sup> *United States v. Ryder*, 110 U. S. 729, 4 Sup. Ct. 196, 28 L. Ed. 308; *JONES v. ORCHARD*, 16 C. B. 614. Contra, *Reynolds v. Harral*, 2 Strob. (S. C.) 87.

<sup>127</sup> *Dunkin v. Hodge*, 46 Ala. 523; *Herman v. Juechner*, 15 Q. B. D. 561, overruling *Wilson v. Strugnell*, 7 Q. B. D. 548; *Consolidated Co. v. Musgrave*, [1900] 1 Ch. 37.

<sup>128</sup> *Lewis v. Lewis*, 92 Ill. 237.

<sup>129</sup> *Lowry v. Bank*, 2 Watts & S. (Pa.) 210.

<sup>130</sup> See *NEW YORK STATE BANK v. FLETCHER*, 5 Wend. (N. Y.) 85.

<sup>131</sup> *THAYER v. DANIELS*, 110 Mass. 345.

<sup>132</sup> *Smith v. Kinney*, 6 Neb. 447; *CROMER v. CROMER'S ADM'RS* 29 Grat. (Va.) 280. See post, § 172 (j), as to defense of bankruptcy among co-sureties.

acter excepted from the operation of the bankruptcy act;<sup>133</sup> nor can the principal be held by the surety, though the debt was not due at the time of the principal's discharge, and was paid by the surety thereafter, if the claim was such that it could have been presented against the bankrupt's estate;<sup>134</sup> but it is otherwise as to claims which could not be presented.<sup>135</sup>

*Statute of Limitations.*

The right of the surety to enforce the liability of the principal may be taken away by the statute of limitations;<sup>136</sup> but the statute does not begin to run until the surety has paid the debt,<sup>137</sup> as the right of action against the principal does not accrue until that time.<sup>138</sup> The surety's right of action is based upon a breach of the implied promise by the principal, and there is no breach until the principal has failed to reimburse the surety upon payment by the latter. If the debt be paid in

<sup>133</sup> *Halliburton v. Carter*, 55 Mo. 435. See Bankr. Act U. S. July 1, 1898, c. 541, § 17, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428] as to the debts not affected by a discharge in bankruptcy. If the debt was paid by the surety prior to the bankruptcy of the principal, he cannot recover from the principal after the latter's discharge, although the debt paid by the surety was one of the class of excepted debts. After payment by the surety, it lost its former character, and became a simple contract debt of the surety against the principal. *CROMER v. CROMER'S ADM'RS*, 29 Grat. (Va.) 280.

<sup>134</sup> *Lipscomb v. Grace*, 26 Ark. 231, 7 Am. Rep. 607; *MACE v. WELLS*, 7 How. (U. S.) 272, 12 L. Ed. 698, reversing *Wells v. Mace*, 17 Vt. 503; *Cobb v. Overman*, 109 Fed. 65, 48 C. C. A. 223, 54 L. R. A. 369; *Hayer v. Comstock*, 7 Am. Bankr. Rep. 493, 88 N. W. 351; Bankr. Act U. S. July 1, 1898, c. 541, § 574, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443].

<sup>135</sup> *Buel v. Gordon*, 6 Johns. (N. Y.) 126; *Comfort v. Eisenbels*, 11 Pa. 13; *Ex parte MARSHAL*, 1 Atkyns, 129.

<sup>136</sup> *Usher v. Tyler*, 85 S. W. 166, 27 Ky. Law Rep. 354. See post, § 172 (k), as to the running of the statute of limitations between co-sureties.

<sup>137</sup> *Reid v. Flippen*, 47 Ga. 273; *Shepard v. Ogden*, 2 Scam. (Ill.) 257; *Wilson v. Crawford*, 47 Iowa, 469; *Bullock v. Campbell*, 9 Gill (Md.) 182; *THAYER v. DANIELS*, 110 Mass. 345; *Barnsback v. Reiner*, 8 Minn. 59 (Gill 37); *Rucks v. Taylor*, 49 Miss. 552; *Burton v. Rutherford*, 49 Mo. 255; *Wesley Church v. Moore*, 10 Pa. 273; *Considine v. Considine*, 9 Ir. L. 400.

<sup>138</sup> *Williams' Adm'rs v. Williams' Adm'rs*, 5 Ohio, 444. See note 45, *supra*.



installments, the statute begins to run from the payment of each.<sup>139</sup> As the action is upon an implied contract, it comes within the provision of the statute in regard to unwritten contracts.<sup>140</sup>

#### AMOUNT OF RECOVERY.

**180. A surety can recover from the principal the amount that he has paid only, with interest and necessary expenses.**

##### *Surety Cannot Speculate on Principal.*

When suit is brought by the surety against the principal, recovery can be had for the amount only which the surety has been compelled to pay the creditor,<sup>141</sup> with interest and the necessary expenses of litigation. As the object of the implied contract is to indemnify the surety, he will not be allowed to speculate.<sup>142</sup> If he has succeeded in discharging the debt for less than the full amount due, he cannot recover any more than he has paid; and, if the principal should pay the surety more than the latter has paid, the principal can recover the excess.<sup>143</sup> But it does not affect the surety's right to re-

<sup>139</sup> DAVIES v. HUMPHRIES, 6 Mees. & W. 153.

<sup>140</sup> Kreider v. Isenbice, 123 Ind. 10, 23 N. E. 786; Poe v. Dixon, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713; Sherrod v. Woodward, 15 N. C. 300, 25 Am. Dec. 714.

<sup>141</sup> WALDRIP v. BLACK, 74 Cal. 409, 16 Pac. 226; Stanford v. Connery, 84 Ga. 731, 11 S. E. 507; Coggeshall v. Ruggles, 62 Ill. 401; Gleseke v. Johnson, 115 Ind. 308, 17 N. E. 573; Crozier's Trustees v. Grayson, 4 J. J. Marsh. (Ky.) 514; Nolte v. Creditors (La.) 7 Mart. (N. S.) 9; Martindale v. Brock, 41 Md. 571; Delaware, L. & W. R. R. Co. v. Oxford Co., 38 N. J. Eq. 151; Bonney v. Seely, 2 Wend. (N. Y.) 481; Price v. Horton, 4 Tex. Civ. App. 526, 23 S. W. 501; Blow v. Maynard, 2 Leigh (Va.) 29; Reed v. Norris, 2 Myl. & Cr. 361; 40 Cent. Dig. col. 2255. Where an accommodation payee of a note purchases it for less than its face value, he cannot recover full value from the maker. Dorsey v. Creditors (La.) 7 Mart. (N. S.) 498; Pace v. Robertson, 65 N. C. 550. Contra, FOWLER v. STRICKLAND, 107 Mass. 552. And see note 85, supra. For a similar rule as between co-sureties, see post, § 165.

<sup>142</sup> Schoonover v. Allen, 40 Ark. 132; DINKGRAVE'S SUCCESSION, 31 La. Ann. 703; Eaton v. Lambert, 1 Neb. 339; Matthews v. Hall's Adm'r, 21 W. Va. 510.

<sup>143</sup> Price v. Horton, 4 Tex. Civ. App. 526, 23 S. W. 501.

cover the full amount paid because a co-surety afterwards has paid him one-half, as he simply would hold one-half of the amount recovered from the principal in trust for the co-surety.<sup>144</sup>

Where the surety has discharged the debt by the transfer of property or depreciated currency to the creditor, the former can recover from the principal the market value thereof only, as it was at the time of the settlement with the creditor.<sup>145</sup> If the sureties, when sued by the creditor, set off a claim which they have against him, the amount which they can recover from the principal is not limited to the excess of the creditor's claim over theirs, but extends to the whole amount of the creditor's claim, as they have discharged the debt partly in cash and partly in their own property; their property being the chose in action.<sup>146</sup>

A provision in the original contract that any payments made by the surety shall be conclusive as to the liability of the principal is contrary to public policy and will not be enforced;<sup>147</sup> but where a surety is sued with the principal, or, if sued alone, notifies the principal, the record of the recovery is conclusive evidence of the measure of damages,<sup>148</sup> for "it would be iniquitous for the principal to stand by and see an excessive recovery against his surety, which he alone could prevent, and then set up the defense when his surety sues him."<sup>149</sup>

<sup>144</sup> Strong v. Blanchard, 4 Allen (Mass.) 538.

<sup>145</sup> Jordan v. Adams, 7 Ark. (2 Eng.) 348; Miles v. Bacon, 4 J. J. Marsh. (Ky.) 457; DINKGRAVE'S SUCCESSION, 31 La. Ann. 703; Hall's Adm'r v. Creswell, 12 Gill & J. (Md.) 36; Bonney v. Seely, 2 Wend. (N. Y.) 481; Kendrick v. Forney, 22 Grat. (Va.) 748; Butler v. Butler's Adm'r, 8 W. Va. 674.

<sup>146</sup> Keokuk v. Love, 81 Iowa, 119.

<sup>147</sup> Fidelity & Casualty Co. of New York v. Crays, 76 Minn. 450, 79 N. W. 531; Fidelity & Casualty Co. of New York v. Elckhoff, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. Rep. 464.

<sup>148</sup> Rice v. Rice, 14 B. Mon. (Ky.) 417; Littleton v. Richardson, 34 N. H. 179, 66 Am. Dec. 759.

<sup>149</sup> HARE v. GRANT, 77 N. C. 203. And see note 87, *supra*.

*Interest.*

The surety is entitled to recover interest<sup>150</sup> at the legal rate<sup>151</sup> on the amount paid, from the date of payment to the time of entering judgment; for the principal has had the use of the money during that time, and the surety has been deprived of its use.

*Costs and Expenses.*

As it is the duty of a surety to pay the debt when due, he has no right to recover the costs of litigation entered into by him to resist the just claim of the creditor,<sup>152</sup> or even the unnecessary costs of a default,<sup>153</sup> unless an express contract between the surety and the principal is broad enough to cover such expenses;<sup>154</sup> but if the principal desires a defense,<sup>155</sup> or the surety has reasonable grounds to suppose that the creditor's claim is not valid, and in good faith resists the creditor's claim, he can recover the necessary expenses of litigation<sup>156</sup>—the burden of proof being upon him to show that

<sup>150</sup> WALDRIP v. BLACK, 74 Cal. 409, 16 Pac. 226; Owings v. Owings, 26 Ky. (3 J. J. Marsh.) 590; Winder v. Diffenderffer, 2 Bland (Md.) 166; Hayden v. Cabot, 17 Mass. 169; Bushong v. Taylor, 82 Mo. 660; Eaton v. Lambert, 1 Neb. 339; Child v. Powder Works, 44 N. H. 354; Vall v. Hartman, 1 C. P. Rep. (Pa.) 132; Hicks' Adm'x v. Bailey, 16 Tex. 229; Robinson v. Sherman, 2 Grat. (Va.) 178, 44 Am. Dec. 381; Cranmer v. McSwords, 26 W. Va. 412; Whereatt v. Ellis, 103 Wis. 348, 79 N. W. 416, 74 Am. St. Rep. 865.

<sup>151</sup> WALDRIP v. BLACK, 74 Cal. 409, 16 Pac. 226. Under a statutory provision, interest at the rate named in the original instrument might be recoverable. See White v. Miller, 47 Ind. 385.

<sup>152</sup> Beckley v. Munson, 22 Conn. 299; Emery v. Vinall, 26 Me. (13 Shep.) 295; Sheehan v. Carroll, 124 Mass. 67; Hayden v. Cabot, 17 Mass. 169; Whitworth v. Tilman, 40 Miss. 76; Holmes v. Weed, 24 Barb. (N. Y.) 546; Wynn v. Brooke, 5 Rawle (Pa.) 106; 40 Cent. Dig. col. 2253. A regular or ordinary indorser cannot recover from the drawer costs which he has been compelled to pay. Simpson v. Griffin, 9 Johns. (N. Y.) 131.

<sup>153</sup> See PIERCE v. WILLIAMS, 23 L. J. R. Exch. 322.

<sup>154</sup> The surety can recover costs if the principal has agreed in writing to save the surety harmless. Bonney v. Seely, 2 Wend. (N. Y.) 481.

<sup>155</sup> HOWES v. MARTIN, 1 Esp. 162.

<sup>156</sup> Coffeen Coal Co. v. Barry, 56 Ill. App. 587; Wagenseller v. Prettyman, 7 Ill. App. 197; Bosley v. Taylor, 5 Dana (Ky.) 157, 30 Am. Dec. 677; Backus v. Coyne, 45 Mich. 584, 8 N. W. 694; Apgar's

his course was calculated to protect the principal's interests as well as his own.<sup>157</sup>

The surety cannot collect from the principal attorney fees paid by the surety in prosecuting the suit against the principal, unless he brings suit on the original instrument itself, which provides for attorney fees,<sup>158</sup> though, of course, he is entitled to costs of the suit against the principal.<sup>159</sup>

*Indirect Damage.*

As the damages recoverable upon any contract are such only as the parties might have supposed to be the natural result of the breach thereof,<sup>160</sup> it follows that a surety cannot recover from the principal any indirect, remote, or consequential damages.<sup>161</sup> When the surety entered into the contract with the creditor, he assumed the inconvenience of being called upon to make payment, and the principal is justified in supposing that a breach of the contract will entail no more loss on the surety than the amount apparently required to settle the debt. Although a surety's property is disposed of at a sacrifice under a forced sale, and his business is broken

*Adm'rs v. Hiller*, 24 N. J. Law, 812; *Thompson v. Taylor*, 72 N. Y. 32; *Baker v. Martin*, 3 Barb. (N. Y.) 634; *Bright v. Lennon*, 83 N. C. 183; *Vall v. Hartman*, 1 C. P. Rep. (Pa.) 132; *Abeles v. Mitchell*, 13 Phila. (Pa.) 81; *McKenna v. George*, 2 Rich. Eq. (S. C.) 15; *Gross v. Davis*, 87 Tenn. 226, 11 S. W. 92, 10 Am. St. Rep. 635; *Bennett v. Dowling*, 22 Tex. 660; *Briggs v. Boyd*, 37 Vt. 541; *Borland v. Curry*, 4 Q. B. C. P. & Ex. (Ir. L.) 273.

<sup>157</sup> *Redfield v. Haight*, 27 Conn. 31; *Whitworth v. Tilman*, 40 Miss. 76; *Thompson v. Taylor*, 72 N. Y. 32; *Cranmer v. McSwords*, 26 W. Va. 412.

<sup>158</sup> *CARPENTER v. MINTER*, 72 Tex. 370, 12 S. W. 180. If the suit is on the implied promise of the principal, and not on the note, the attorney fees provided for in the note are not recoverable, if the surety has paid the note without suit. *Gleseke v. Johnson*, 115 Ind. 309, 17 N. E. 573.

<sup>159</sup> *Owings v. Owings*, 26 Ky. (3 J. J. Marsh.) 590; *Apgar's Adm'rs v. Hiller*, 24 N. J. Law, 812; *Elwood v. Delfendorf*, 5 Barb. (N. Y.) 398; *Bonney v. Seely*, 2 Wend. (N. Y.) 481; *Feamster v. Withrow*, 12 W. Va. 611.

<sup>160</sup> *Clark*, Cont. (2d Ed.) p. 485.

<sup>161</sup> *Powell v. Smith*, 8 Johns. (N. Y.) 249; *Vance v. Lancaster*, 3 Hayw. (Tenn.) 130.

up, he cannot recover from the principal any more than the amount of the creditor's claim, with interest.<sup>163</sup>

#### APPLICATION OF SECURITY GIVEN SURETY.

**161. If a surety has been given security, he may apply it on the debt as soon as the debt is due and unpaid.**

If the principal or a third person has given the surety indemnity against any loss which he may sustain by reason of having entered into the relation, he may proceed to make such security available before he has paid the debt.<sup>163</sup> If the security be a mortgage, he may foreclose it as soon as he is called upon by the creditor for payment.<sup>164</sup> If the security be property, the surety may sell it to procure proceeds with which to make payment.<sup>165</sup>

If the surety has been compelled to pay, he can enforce the security, although the remedy of the creditor against the principal has been barred by the statute of limitations.<sup>166</sup>

#### *Security for Several Debts.*

If the surety be liable for two or more debts, due at different times, and holds security for all, he may proceed to enforce the security after the first debt is due, and need not wait until after the maturity of the others.<sup>167</sup>

<sup>163</sup> *Hayden v. Cabot*, 17 Mass. 169.

<sup>165</sup> *Mattingly v. Paul*, 88 Ind. 95; *Klein v. Funk*, 82 Minn. 3, 84 N. W. 460; *Tankersley v. Anderson*, 4 Desaus. (S. C.) 44. *Contra*, *Darst v. Bates*, 51 Ill. 439; *Planters' Bank v. Douglass*, 2 Head (Tenn.) 699.

<sup>164</sup> *De Cottes v. Jeffers*, 7 Fla. 284; *In re Montgomery's Succession*, 2 La. Ann. 469; *Markell v. Eichelberger*, 12 Md. 78; *Kramer v. Farmers' Bank*, 15 Ohio, 253; *Hellams v. Abercrombie*, 15 S. C. 110, 40 Am. Rep. 684. If a mortgage be given to secure three guarantors, all may join in foreclosing it, although one has paid nothing. *Dye v. Mann*, 10 Mich. 291.

<sup>166</sup> *Bird v. Benton*, 18 N. C. 179.

<sup>165</sup> *Rucks v. Taylor*, 49 Miss. 552.

<sup>167</sup> *Smith v. James*, 1 Miles (Pa.) 162.

*Security Cannot be Applied on Other Debts.*

The surety must apply security to the particular debt for which it was given;<sup>168</sup> but, where a mortgage was given to indemnify a surety against loss upon certain notes, such security was held to extend to other notes given in substitution of the original ones.<sup>169</sup>

*Ignorance of Security.*

Where security has been given without the knowledge of the surety, he can take advantage of it when he discovers it, because a trust has been created in his favor which he can enforce.<sup>170</sup> Thus, where land was conveyed to a third person, who agreed to sell it and apply the proceeds upon a note for which a surety was liable, the latter can compel the grantee to carry out his agreement, although the surety was not aware of the conveyance at the time it was made.<sup>171</sup>

<sup>168</sup> Clark v. Oman, 15 Gray (Mass.) 521; Newell v. Hurlburt, 2 Vt. 351.

<sup>169</sup> Pond v. Clarke, 14 Conn. 834. See, also, Patterson v. Johnston, 7 Ohio, 225, pt. 1.

<sup>170</sup> Woodbury v. Bowman, 14 Me. 154, 31 Am. Dec. 40.

<sup>171</sup> Pratt v. Thornton, 28 Me. 355, 48 Am. Dec. 492.

## CHAPTER VII.

### RIGHTS AND LIABILITIES OF CO-SURETIES AS TO EACH OTHER.

- 162. Who Are Co-Sureties.
- 163. Contribution—In General.
- 164. What Is Payment.
- 165-167. Amount Recoverable.
- 168-171. Suit for Contribution.
- 172-174. Defenses.
- 175. Subrogation.

### WHO ARE CO-SURETIES.

**162. Sureties who are bound similarly for the same principal, to the same creditor or obligee, and for the same debt or duty, are co-sureties, although they are bound by separate instruments, executed at different times, without knowledge of each other.**

Having discussed the rights and liabilities of the surety and creditor, and of the surety and principal, it is the intention to treat, in this chapter, of the rights and liabilities of co-sureties as such; but, before discussing these rights and liabilities, it will be necessary to determine who are co-sureties. It is not sufficient, to constitute persons co-sureties, that they all became bound for the same principal, to the same creditor, at the same time; for the same principal might give several notes at one time to the same creditor, yet each might be for a distinct debt entirely independent of the others.<sup>1</sup> Nor is it sufficient that they all became secondarily liable on the same instrument, and would be liable for the same default of the principal; for on the same promissory note some of the parties may be sureties as co-makers, some supplemental sureties, some guarantors, and some indorsers, the contract of each being entirely independent from that of the others, with dif-

<sup>1</sup> *COOPE v. TWYNAM*, Turn. & R. 426; *Pendlebury v. Walker*.

<sup>4</sup> *Younge & C. (Exch.)* 424.

ferent rights and liabilities connected therewith, and they are not co-sureties as to each other.

If, however, sureties undertake to be bound to the same creditor or obligee for the payment of the same debt or the performance of the same duty by the same principal, and the terms of their contracts are substantially the same, they are co-sureties,<sup>2</sup> even though they execute separate instruments,<sup>3</sup> and at different times,<sup>4</sup> in ignorance of each others' engagements.<sup>5</sup>

Courts regard the substance more than the form of the contracts.<sup>6</sup> Sureties who sign the same note as makers with the principal would be co-sureties in the absence of any express agreement, and are presumed to be such.<sup>7</sup> So would all the sureties on the same bond of an officer; but an officer may give

<sup>2</sup> *Woodworth v. Bowes*, 5 Ind. (3 Port.) 276; *Stockmeyer v. Oertling*, 35 La. Ann. 467; *Taylor v. Savage*, 12 Mass. 98; *Norton v. Coons*, 6 N. Y. 33. Where one section of a statute requires a dramshop keeper to give bond conditioned that he will pay to all persons all damages they may sustain by the sale of liquor, and another section makes the owner of the premises jointly liable with the dramshop keeper for damages sustained by a husband, wife, or child, caused by the sale of liquor, the owner of the premises is not a co-surety with the sureties on the bond. *Wanack v. Michels*, 215 Ill. 87, 74 N. E. 84, affirming 114 Ill. App. 631.

<sup>3</sup> *Dugger v. Wright*, 51 Ark. 232, 11 S. W. 213, 14 Am. St. Rep. 48; *Houck v. Graham*, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727; *Elbert v. Jacoby*, 8 Bush (Ky.) 542; *Young v. Shunk*, 30 Minn. 503, 16 N. W. 402; *Armitage v. Pulver*, 37 N. Y. 494; *Schram v. Werner*, 85 Hun. 293, 32 N. Y. Supp. 995; *Pickens v. Miller*, 83 N. C. 543; *Harris v. Ferguson*, 2 Bailey (S. C.) 397; *Rosenbaum v. Goodman*, 78 Va. 121; *Rudolf v. Malone*, 104 Wis. 470, 80 N. W. 743; *DEERING v. WINCHELSEA*, 2 Bos. & P. 270, 1 Cox, 318.

<sup>4</sup> *Ammons v. People*, 11 Ill. 6; *Stevens v. Tucker*, 87 Ind. 109; *WARNER v. MORRISON*, 3 Allen (Mass.) 566; *Forbes v. Harrington*, 171 Mass. 386, 50 N. E. 641; *State v. Hull*, 53 Miss. 626; *Commonwealth v. Cox's Adm'r*, 30 Pa. 442; *McGlothlin v. Wyatt*, 1 Lea (Tenn.) 717.

<sup>5</sup> *Monson v. Drakeley*, 40 Conn. 552, 16 Am. Rep. 74; *WARNER v. MORRISON*, 3 Allen (Mass.) 566; *Chaffee v. Jones*, 19 Pick. (Mass.) 260; *Wells v. Miller*, 66 N. Y. 255; *Barry v. Ransom*, 12 N. Y. 462; *CRAYTHORNE v. SWINBURNE*, 14 Ves. 160.

<sup>6</sup> *REYNOLDS v. WHEELER*, 10 C. B. (N. S.) 561.

<sup>7</sup> *Houck v. Graham*, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727; *Eisley v. Horr*, 42 Neb. 3, 60 N. W. 365.



two or more bonds at different times, yet the sureties on all the bonds would be co-sureties if the bonds were given for the performance of the same official duty.<sup>8</sup> If, however, one bond has been given to supersede the other,<sup>9</sup> or the duties secured are different, they are not co-sureties. Thus, sureties on a bond given by an administrator to secure the performance of his duties in general are not co-sureties with sureties on a bond given by him to secure the proper performance of duties connected with the sale of real estate only.<sup>10</sup>

If three persons sign a note jointly, each receiving a part of the money for which the note is given, any two of them will be co-sureties for the remaining one.<sup>11</sup> Where an agent of various persons pledges the notes of such persons for his debt, the owners of the notes are co-sureties for the agent.<sup>12</sup>

#### *Supplemental Sureties Not Co-Sureties.*

A supplemental surety is not a co-surety with the surety,<sup>13</sup> for the surety is, as to him, in the position of a principal;<sup>14</sup> and it does not make any difference that the surety supposed that another would sign as co-surety.<sup>15</sup> Where a surety, signing after other sureties have signed, adds the words, "surety to the above," after his signature, it indicates an intention to

<sup>8</sup> *Powell v. Powell*, 48 Cal. 235; *Wann v. People*, 57 Ill. 202; *Burnett v. Millsaps*, 59 Miss. 333; *Cherry v. Wilson*, 78 N. C. 164; *Harris v. Ferguson*, 2 Bailey (S. C.) 397.

<sup>9</sup> *State ex rel. Knapp, Stout & Co. v. Finn*, 23 Mo. App. 290.

<sup>10</sup> *Salyers v. Ross*, 15 Ind. 130.

<sup>11</sup> *Henderson v. McDuffee*, 5 N. H. 38, 20 Am. Dec. 557. See, also, *Moore v. State*, 49 Ind. 558; *Collins v. Carlisle*, 7 B. Mon. (Ky.) 13; *Newton v. Newton*, 53 N. H. 537; *Boyd's Ex'rs v. Boyd*, 3 Grat. (Va.) 113.

<sup>12</sup> *McBRIDE v. POTTER-LOVELL CO.*, 169 Mass. 7, 47 N. E. 242, 61 Am. St. Rep. 265.

<sup>13</sup> *Buckley v. House*, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247; *Robertson v. Deatherage*, 82 Ill. 511; *Paul v. Berry*, 78 Ill. 158; *Knox v. Vallandigham*, 21 Miss. (13 Smedes & M.) 526; *Whitehouse v. Hanson*, 42 N. H. 9; *Dawson v. Pettway*, 20 N. C. 531; *PRESTON v. PRESTON*, 4 Grat. (Va.) 88, 47 Am. Dec. 717; *CRAYTHORNE v. SWINBURNE*, 14 Ves. 160.

<sup>14</sup> *Ante*, c. VI, note 66.

<sup>15</sup> *Adams v. Flanagan*, 36 Vt. 400.

be a supplemental surety.<sup>16</sup> As has been shown before, where successive bonds are given in legal proceedings, the sureties upon one obligation are supplemental sureties as to those on obligations given afterwards,<sup>17</sup> and not co-sureties with them.<sup>18</sup> So, successive indorsers are not co-sureties,<sup>19</sup> but each occupies the relation of a supplemental surety for those who became indorsers before he did;<sup>20</sup> and guarantors are supplemental sureties as to sureties in the narrower sense.<sup>21</sup>

*True Relation May Be Shown Orally.*

Evidence as to the actual relation is always admissible,<sup>22</sup> and it is competent for a surety to show an oral agreement with

<sup>16</sup> Harris v. Warner, 13 Wend. (N. Y.) 400; Thompson v. Sanders, 20 N. C. 539; Slinger Mfg. Co. v. Bennett, 28 W. Va. 16.

<sup>17</sup> Ante, c. V, note 638.

<sup>18</sup> Dunlap v. Foster, 7 Ala. 734; Chrisman v. Jones, 34 Ark. 73; Friberg v. Donovan, 23 Ill. App. 58; Brandenburg v. Flynn, 12 B. Mon. (Ky.) 397; Hinckley v. Kreitz, 58 N. Y. 583; Pott v. Nathans, 1 Watts & S. (Pa.) 155, 37 Am. Dec. 456; Chaffin v. Campbell, 4 Sneed (Tenn.) 184; PRESTON v. PRESTON, 4 Grat. (Va.) 88, 47 Am. Dec. 717. Of course, if the surety joins in the appeal, he becomes a principal as to the surety on the appeal bond. Hartwell v. Smith, 15 Ohio St. 200; Cowan v. Duncan, Meigs (Tenn.) 470.

<sup>19</sup> Nurre v. Chittenden, 56 Ind. 462; McGurk v. Huggett, 56 Mich. 187, 22 N. W. 308; Briggs v. Boyd, 37 Vt. 534. Accommodation indorsers are not co-sureties. Knopf v. Morel, 111 Ind. 570, 13 N. E. 51; Smith v. Smith, 16 N. C. 173. An accommodation indorser is not a co-surety with an accommodation acceptor. Gomez v. Lazarus, 16 N. C. 205. Successive irregular indorsers are not co-sureties. M'DONALD v. MAGRUDER, 3 Pet. (U. S.) 470, 7 L. Ed. 744.

<sup>20</sup> Ante, c. I, note 19.

<sup>21</sup> Monson v. Drakeley, 40 Conn. 552, 15 Am. Rep. 74; Hamilton v. Johnston, 82 Ill. 39; Longley v. Griggs, 27 Mass. (10 Pick.) 121; Chapman v. Garber, 46 Neb. 16, 64 N. W. 362; Keith v. Goodwin, 31 Vt. 268, 73 Am. Dec. 345. A guarantor, upon payment of the debt, can collect from a surety in the narrow sense of the word. Ante, c. VI, note 67. A guarantor and an indorser are not co-sureties. Phillips v. Plato, 42 Hun, 189.

<sup>22</sup> Rhodes v. Sherrod, 9 Ala. 63; Klepper v. Borchsenius, 13 Ill. App. (13 Bradw.) 318; Drummond v. Yager, 10 Ill. App. 380; Preston v. Gould, 64 Iowa, 44, 19 N. W. 834; Edelen v. White, 6 Bush (Ky.) 408; Smith v. Morrill, 54 Me. 48; Weston v. Chamberlain, 7 Cush. (Mass.) 404; Clapp v. Rice, 13 Gray (Mass.) 403, 74 Am. Dec. 639; Farwell v. Ensign, 66 Mich. 600, 33 N. W. 734; Dunn v. Wade, 23 Mo. 247; Paul v. Rider, 58 N. H. 119; EASTERLY v. BARBER,

those apparently co-sureties with him that as to them he is a supplemental surety;<sup>22</sup> or it may be shown, likewise, that parties apparently not co-sureties are such,<sup>24</sup> the presumption being that those liable to the creditor in different relations, such as the maker and indorser of a promissory note, are not co-sureties.<sup>23</sup> Admitting oral evidence in these cases is not varying a written contract, as the written contract was with the creditor, who is not a party to their contract with each other. The oral contract which they made was an independent one, taking the place of the one which the law would have implied in the absence of the express one.<sup>26</sup>

66 N. Y. 433; *Kelley v. Few*, 18 Ohio, 441; *Montgomery v. Page*, 29 Or. 320, 44 Pac. 689; *Ross v. Espy*, 66 Pa. 481, 5 Am. Rep. 394; *Kiel v. Choate*, 92 Wis. 517, 87 N. W. 431, 53 Am. St. Rep. 936; *Phillips v. Preston*, 5 How. (U. S.) 278, 12 L. Ed. 152; *CRAYTHORNE v. SWINBURNE*, 14 Ves. 160.

<sup>22</sup> *Monson v. Drakeley*, 40 Conn. 552, 16 Am. Rep. 74; *Paul v. Berry*, 78 Ill. 158; *Myers v. Fry*, 18 Ill. App. (18 Bradw.) 74; *Chapeze v. Young*, 87 Ky. 476, 9 S. W. 399; *Barry v. Ransom*, 12 N. Y. 462; *Oldham v. Broom*, 28 Ohio St. 41; *Anderson v. Peareson*, 2 Bailey (S. C.) 107.

<sup>24</sup> *Rhodes v. Sherrod*, 9 Ala. 63; *Knopf v. Morel*, 111 Ind. 570, 13 N. E. 51; *Coolidge v. Wiggin*, 62 Me. 568; *Weston v. Chamberlin*, 7 Cush. (Mass.) 404. Indorsers may be shown to be co-sureties. *Camp v. Simmons*, 62 Ga. 73; *Preston v. Gould*, 64 Iowa, 44, 19 N. W. 834; *Smith v. Morrill*, 54 Me. 48; *Kiel v. Choate*, 92 Wis. 517, 87 N. W. 431, 53 Am. St. Rep. 936. Accommodation indorsers may be shown to be co-sureties. *Stillwell v. How*, 46 Mo. 589. And one accommodation indorser is not estopped to show this because he has requested the creditor to proceed against another. *EASTERLY v. BARBER*, 66 N. Y. 433. Irregular indorsers may be shown to be co-sureties. *Armstrong v. Cook*, 30 Ind. 22; *Edelen v. White*, 6 Bush (Ky.) 408; *Dunn v. Wade*, 23 Mo. 207. An acceptor and an indorser may be shown to be co-sureties. *Robinson v. Kilbreth*, 1 Bond (U. S.) 592, Fed. Cas. No. 11,957.

<sup>25</sup> *Robertson v. Deatherage*, 82 Ill. 511; *Nurre v. Chittenden*, 56 Ind. 462.

<sup>26</sup> *Water Power Co. v. Brown*, 23 Kan. 676; *Mansfield v. Edwards*, 136 Mass. 15, 49 Am. Rep. 1; *Barry v. Rawson*, 12 N. Y. 462; *Williams v. Glenn*, 92 N. C. 253, 53 Am. Rep. 416; *Stovall v. Adair*, 9 Okl. 620, 60 Pac. 282; *Montgomery v. Page*, 29 Or. 320, 44 Pac. 689; *Bank v. Layne*, 101 Tenn. 45, 46 S. W. 762.

**CONTRIBUTION.**

**163.** Under a contract which the law implies in the absence of an express agreement in regard to the matter, any co-surety, upon payment to the creditor of more than his proportionate share of the debt due, can have contribution from the other co-sureties who have not paid their proportionate shares.

**WHAT CONSTITUTES PAYMENT.**

**164.** Anything accepted by the creditor in satisfaction of the debt will be regarded as payment.

*Right of Contribution.*

As has been seen, the law implies a promise by the principal to reimburse his surety for all disbursements necessarily made on account of the debt.<sup>27</sup> The law likewise implies a promise by each surety, when there are two or more, to contribute proportionately to a surety who has paid more than his share of the indebtedness;<sup>28</sup> the rules governing the liability of the prin-

<sup>27</sup> Ante, § 153.

<sup>28</sup> Crawford v. Kirksey, 50 Ala. 590; Chrisman v. Jones, 34 Ark. 73; Paul v. Berry, 78 Ill. 158; Wood v. Perry, 9 Iowa, 479; Caldwell v. Roberts, 31 Ky. (1 Dana) 355; Stockmeyer v. Oertling, 38 La. Ann. 100; Goodall v. Wentworth, 20 Me. pt. 1 (2 App.) 322; Taylor v. Savage, 12 Mass. 98; Weston v. Elliott, 72 N. H. 433, 57 Atl. 336; PAULIN v. KAIGHN, 29 N. J. Law (5 Dutch.) 480; Toucey v. Schell, 37 N. Y. Supp. 879, 15 Misc. Rep. 350; Strickler v. Glitchel, 14 Okl. 523, 78 Pac. 94; Eakin v. Knox, 6 Rich. (S. C.) 14; McClelland v. Davis, 72 Tenn. (4 Lea) 97; Glasscock v. Hamilton, 62 Tex. 143; Foster v. Johnson, 5 Vt. 60; FLEETWOOD v. CHARNOCK (1629) Nelson, 10, Tothill, 41; LAYER v. NELSON, 1 Vernon, 456; 40 Cent. Dig. col. 2328. The right of contribution exists among co-guarantors. Golsen v. Brand, 75 Ill. 148. And among sureties in criminal cases. The doctrine that sureties in criminal cases cannot recover indemnity from their principal, as it would deprive them of an incentive to perform their duty—ante, § 159 (e)—does not apply when contribution is sought. Belond v. Guy, 20 Wash. 160, 54 Pac. 995. If two co-sureties give their joint note to the creditor, they can sue a third for contribution, although he was a surety on their joint note. Prescott v. Newell, 39 Vt. 82. A proportionate part of the debt may be set off against the claim of a co-surety to a legacy from a deceased co-

cipal to the surety, and of the sureties to each other, being very similar. The chief right which co-sureties have as to each other is this right of contribution, which arises in all cases where two or more are similarly liable for the same debt,<sup>20</sup> and applies to all kinds of suretyship, voluntary or otherwise.

*Origin of Right of Contribution.*

The right of contribution was recognized originally in courts of equity only,<sup>21</sup> in an endeavor to do justice by equalizing a common burden; the maxim being, "Equality is equity."<sup>22</sup> Later the common-law courts assumed jurisdiction<sup>23</sup> on the theory that the equitable principle had been recognized so long, and was known so generally, that those who became co-sureties did so in reliance on this principle, and a promise was implied in law that each co-surety should contribute his share of the debt.<sup>24</sup> Although it is a good defense, in a chancery proceeding, that the complainant has an adequate remedy at law, this applies to such matters only as were not originally within the jurisdiction of courts of law. Courts of equity retain jurisdiction of every matter that was ever within their

surety; the debt having been paid from the deceased co-surety's estate. *BAILY'S ESTATE*, 156 Pa. 634, 27 Atl. 560, 22 L. R. A. 444.

<sup>20</sup> Fetter, Eq. p. 252.

<sup>21</sup> *Conover v. Hill*, 76 Ill. 342; *LANSDALE'S ADM'R v. COX*, 7 T. B. Mon. (Ky.) 401; *Smith's Ex'rs v. Anderson*, 18 Md. 520; *Dennis v. Gillespie*, 24 Miss. 581; *TOBIAS v. ROGERS*, 13 N. Y. 59; *Wells v. Miller*, 66 N. Y. 255. The old common-law idea was that, as each surety was jointly and severally bound, the obligee had his election, and, if contribution were allowed, it would be a great cause of suits. *WORMLEIGHTON & HUNTER'S CASE* (1613) Godbolt, 243. Contribution at law was denied, as late as the year 1801, in *Carrington v. Carson*, Cam. & N. Conf. R. 216.

<sup>22</sup> *Wells v. Miller*, 66 N. Y. 255; *Norton v. Coons*, 6 N. Y. 33; *Van Winkle v. Johnson*, 11 Or. 469, 5 Pac. 922, 50 Am. Rep. 495; *DEERING v. WINCHELSEA*, 2 Bos. & P. 270, 1 Cox, 319; Fetter, Eq. p. 252.

<sup>23</sup> *Jeffries v. Ferguson*, 87 Mo. 244.

<sup>24</sup> *LANSDALE v. COX*, 7 T. B. Mon. (Ky.) 401; *WARNER v. MORRISON*, 3 Allen (Mass.) 566; *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669; *Agnew v. Bell*, 4 Watts (Pa.) 31; *Pile v. McCoy*, 99 Tenn. 367, 41 S. W. 1052; *BATARD v. HAWES*, 2 El. & Bl. 287.

jurisdiction, although common-law courts may have assumed jurisdiction of the same matters afterwards.<sup>84</sup> Hence, in modern times, the right to contribution may be enforced either at law or in chancery.

*When Implied Promise Arises.*

The promise is implied by law at the instant two or more become co-sureties,<sup>85</sup> so that fraudulent conveyances made by one co-surety at any time after the delivery of his contract may be set aside at the suit of another who has paid the debt.<sup>86</sup>

*Express Agreement as to Contribution.*

It is competent for co-sureties, by express agreement among themselves, before or after the right accrues,<sup>87</sup> to enlarge, restrict, or take away entirely this right of contribution;<sup>88</sup> and such agreements may be shown, though oral.<sup>89</sup>

*Contribution Not Affected by Holding Security.*

The right of contribution is not affected by the fact that the co-surety seeking contribution holds security,<sup>90</sup> or that he

<sup>84</sup> Fetter, Eq. p. 11.

<sup>85</sup> *Nally v. Long*, 56 Md. 567. Inasmuch as the liability arises when the original contract was entered into, a legacy to a co-surety can be applied on the share due from him to the estate of a deceased surety, although the debt was paid from the estate after the legacy was assigned. *BAILY'S ESTATE*, 156 Pa. 634, 27 Atl. 560, 22 L. R. A. 444. Death does not affect the right. *BRADLEY v. BURWELL*, 3 Denio (N. Y.) 61. See post, § 174.

<sup>86</sup> *Sargent v. Salmond*, 27 Me. 539; *Smith v. Rumsey*, 83 Mich. 183; *Wayland v. Tucker*, 4 Grat. (Va.) 267, 50 Am. Dec. 76. Regarding similar right as to the principal, see ante, c. VI, note 23.

<sup>87</sup> *Moore v. Isley*, 22 N. C. 372.

<sup>88</sup> *Curtis v. Parks*, 55 Cal. 106; *Hayden v. Thrasher*, 18 Fla. 795; *Robertson v. Deatherage*, 82 Ill. 511; *Paul v. Berry*, 78 Ill. 158; *Jones v. Letcher*, 13 B. Mon. (Ky.) 363; *Blake v. Cole*, 22 Pick. (Mass.) 97; *Cutter v. Emery*, 37 N. H. 567; *Apgar's Adm'r v. Hiller*, 24 N. J. Law, 812; *Rose v. Wollenberg*, 31 Or. 269, 44 Pac. 382, 39 L. R. A. 378, 65 Am. St. Rep. 826; *Patterson v. Patterson*, 23 Pa. 464; *Anderson v. Peareson*, 2 Bailey (S. C.) 107; *Hall v. Taylor* (Tex. Civ. App.) 95 S. W. 755; *Martin v. Marshall*, 60 Vt. 321, 13 Atl. 420; *Swain v. Wall*, 1 Rep. Ch. 149. And see post, § 172 (e).

<sup>89</sup> *Horn v. Bray*, 51 Ind. 555, 19 Am. Rep. 742; *Hunt v. Chambliss*, 7 Smedes & M. (Miss.) 532; *Wells v. Miller*, 66 N. Y. 255; *Barry v. Ransom*, 12 N. Y. 462; *Ferrell v. Maxwell*, 28 Ohio St. 383, 22 Am. Rep. 393; *THOMAS v. COOK*, 3 M. & R. 444, 8 B. & C. 728.

<sup>90</sup> *Williams v. Riehl*, 127 Cal. 365, 59 Pac. 762, 78 Am. St. Rep. 60;

is seeking to enforce such security,<sup>41</sup> if he has not realized anything as yet therefrom; but, as soon as any proceeds of such security are available, whether before or after contribution has been made, he must account for the same.<sup>42</sup>

*Necessity of Payment.*

Generally, before seeking contribution, a co-surety must pay the debt,<sup>43</sup> or a part of it in excess of his share;<sup>44</sup> but he is not required to wait until the creditor brings suit against him,<sup>45</sup> or even wait for a demand to be made. He may

*Johnson's Adm'r v. Vaughn*, 65 Ill. 425; *Bachelder v. Fiske*, 17 Mass. 464; *Roeder v. Niedermeler*, 112 Mich. 608, 71 N. W. 154; *Mosely v. Fullerton*, 59 Mo. App. 143, 1 Mo. App. Rep. 35; *PAULIN v. KAIGHN*, 29 N. J. Law, 480; *Glasscock v. Hamilton*, 62 Tex. 143. On the other hand, the fact that a co-surety is indemnified by the principal does not make him liable for any more than his proportionate share. *Taylor v. Savage*, 12 Mass. 98. That surety's remedy against the principal is not affected by the fact that the surety holds security, see ante, c. VI, note 13; and that creditor's right to proceed against the surety is not affected by the fact that the creditor holds security, see ante, c. V, note 12.

<sup>41</sup> *Anthony v. Percifull*, 8 Ark. (3 Eng.) 494.

<sup>42</sup> *Johnson's Adm'r v. Vaughn*, 65 Ill. 425; *Bachelder v. Fiske*, 17 Mass. 464. And see note 116, infra. For a similar rule as between the surety and creditor, see ante, § 132 (a).

<sup>43</sup> *May v. Vann*, 15 Fla. 553; *Sargent v. Salmond*, 27 Me. 539; *People v. Duncan*, 1 Johns. (N. Y.) 311; *Brisendine v. Martin*, 23 N. C. 286; *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669; *Gourdin v. Trenholm*, 25 S. C. 362; *Wayland v. Tucker*, 4 Grat. (Va.) 267, 50 Am. Dec. 76.

<sup>44</sup> *Backus v. Coyne*, 45 Mich. 584, 8 N. W. 694.

<sup>45</sup> *Stallworth v. Preslar*, 34 Ala. 505; *Love v. Gibson*, 2 Fla. 598; *Nixon v. Beard*, 111 Ind. 137, 12 N. E. 131; *Wood v. Perry*, 9 Iowa, 479; *Bond v. Bishop*, 18 La. Ann. 549; *Goodall v. Wentworth*, 20 Me. 322; *WARNER v. MORRISON*, 3 Allen (Mass.) 566; *Skralnka v. Rohan*, 18 Mo. App. 341; *BRADLEY v. BURWELL*, 3 Denio (N. Y.) 61; *Supplee v. Sayre*, 51 Hun, 80, 3 N. Y. Supp. 627; *Linn v. McClelland*, 20 N. C. 596; *Lucas v. Guy*, 2 Bailey (S. C.) 403; *Acers v. Curtis*, 68 Tex. 423, 4 S. W. 551; *Hardell v. Carroll*, 90 Wis. 350, 63 N. W. 275; *Pitt v. Purssord*, 8 Mees. & Wels. 538. If suit has been brought, the surety may pay before trial. *Machado v. Fernandez*, 74 Cal. 362, 16 Pac. 19. Or, if judgment has been obtained, he may pay before execution is issued. *Buckner's Adm'r v. Stewart*, 34 Ala. 529; *Briggs v. Hinton*, 14 Lea (Tenn.) 233; *Mason v. Pieron*, 69 Wis. 585, 34 N. W. 921.

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pay without consulting his co-surety;<sup>46</sup> and, if sued, he need not notify his co-surety of that fact.<sup>47</sup> He is not required to resort first to the principal,<sup>48</sup> nor to notify his co-surety that the debt has been paid,<sup>49</sup> nor to make any demand before bringing suit.<sup>50</sup> He may pay the debt before it is due, if the creditor be willing, though he cannot have contribution until the maturity of the debt,<sup>51</sup> unless such prior payment was at the request of the co-surety.

*Exoneration in Equity before Payment.*

The general rule that a co-surety must pay the debt before he can bring an action for contribution, like most general rules, is subject to exception.<sup>52</sup> As contribution is enforced in an effort to do equity, a court of equity will not require payment by a co-surety seeking contribution, where to insist upon prior payment would work a great hardship and injustice.<sup>53</sup> Suppose 10 persons were co-sureties for \$50,000. It might be ruinous for one to raise this entire sum on short notice, or be compelled to borrow it at interest. In such a case, one co-surety, before making payment, could file a bill in equity to require the others to contribute their shares.<sup>54</sup> So,

<sup>46</sup> Hoyt v. Tuthill, 33 Hun, 196.

<sup>47</sup> Fisk v. Comstock, 2 Rob. (La.) 25.

<sup>48</sup> Buckner's Adm'r v. Stewart, 34 Ala. 529; Taylor v. Reynolds, 53 Cal. 686; Sloo v. Pool, 15 Ill. 47; Rankin v. Collins, 50 Ind. 158; Caldwell v. Roberts, 31 Ky. (1 Dana) 355; Goodall v. Wentworth, 20 Me. 322; Mosely v. Fullerton, 59 Mo. App. 143; Smith v. Mason, 44 Neb. 610, 63 N. W. 41; Odlin v. Greenleaf, 3 N. H. 270; Boutin v. Etsell, 110 Wis. 276, 85 N. W. 964.

<sup>49</sup> Taylor v. Reynolds, 53 Cal. 686; Wood v. Perry, 9 Iowa, 479; Bright v. Lennon, 83 N. C. 183; Mason v. Pierron, 69 Wis. 585, 34 N. W. 921.

<sup>50</sup> Ward v. Henry, 5 Conn. 595, 13 Am. Dec. 119; Morrison v. Poyntz, 7 Dana (Ky.) 307, 32 Am. Dec. 92; Chaffee v. Jones, 36 Mass. (19 Pick.) 260; Vliet v. Wyckoff, 42 N. J. Eq. 644, 9 Atl. 679; Sherrod v. Woodard, 15 N. C. 360, 25 Am. Dec. 714; Lucas v. Guy, 2 Bailey (S. C.) 403; Cage v. Foster, 13 Tenn. (5 Yerg.) 261, 28 Am. Dec. 265; Foster v. Johnson, 5 Vt. 60; 40 Cent. Dig. col. 2370.

<sup>51</sup> Machado v. Fernandez, 74 Cal. 362, 16 Pac. 19.

<sup>52</sup> OFFLEY v. JOHNSON (1584) 2 Leonard, 166, pl. 202.

<sup>53</sup> Hyde v. Tracy, 2 Day, 492; Hodgson v. Baldwin, 65 Ill. 532; McKenna v. George, 2 Rich. Eq. (S. C.) 15; MORGAN v. SEYMOUR, 1 Rep. in Ch. 120.

<sup>54</sup> WOLMERSHAUSEN v. GULLICK [1893] 2 Ch. 514.



one co-surety, before payment, can file a bill in equity against co-sureties who are seeking to escape liability by a fraudulent conveyance of their property.<sup>55</sup>

*What Constitutes Payment.*

A co-surety will be deemed to have made payment if he has given his own negotiable promissory note,<sup>56</sup> although not due,<sup>57</sup> or not paid,<sup>58</sup> and the maker is insolvent,<sup>59</sup> as this is equivalent to the payment of cash by him personally, which is reloaned to him by the creditor. Were he compelled to wait until payment of his own note, some of the co-sureties might have become insolvent. It makes no difference that the creditor subsequently donates the note to the maker,<sup>60</sup> as the creditor would have had the right to make him a present of money, had he paid in money. So, payment in land or other property,<sup>61</sup> which is received by the creditor in satisfaction of the demand, is sufficient.

<sup>55</sup> *Pashby v. Mandigo*, 42 Mich. 172, 3 N. W. 927; *Smith v. Rumsey*, 83 Mich. 183; *Bowen v. Hoskins*, 45 Miss. 183, 7 Am. Rep. 728.

<sup>56</sup> *Pinkston v. Tallaferrro*, 9 Ala. 547; *Anthony v. Percifull*, 8 Ark. (3 Eng.) 494; *Ralston v. Wood*, 15 Ill. 159, 58 Am. Dec. 604; *White v. Carlton*, 52 Ind. 371; *Atkinson v. Stewart*, 41 Ky. (2 B. Mon.) 348; *Bell v. Boyd*, 76 Tex. 133, 13 S. W. 232; *Prescott v. Newell*, 39 Vt. 82. For a similar rule as to surety and principal, see ante, c. VI, note 59. The rule is otherwise if the note given by the co-surety be nonnegotiable. *Stone v. Farwell*, 83 Cal. 547, 23 Pac. 703, 8 L. R. A. 425, 17 Am. St. Rep. 272; *White v. Miller*, 47 Ind. 385; *Huse v. Ames*, 104 Mo. 91, 15 S. W. 965; *Cumming v. Hackley*, 8 Johns. (N. Y.) 202; *Morrison v. Berkey*, 7 Serg. & R. (Pa.) 238; *Peters v. Barnhill*, 1 Hill (S. C.) 237; *Boulware v. Robinson*, 8 Tex. 327, 58 Am. Dec. 117; *Barth v. Graf*, 101 Wis. 27, 76 N. W. 1100.

<sup>57</sup> *Nixon v. Beard*, 111 Ind. 187, 12 N. E. 131; *Chandler v. Brainard*, 14 Pick. (Mass.) 285; *Ryan v. Krusor*, 76 Mo. App. 496; *Witherby v. Mann*, 11 Johns. (N. Y.) 518.

<sup>58</sup> *Smith v. Mason*, 44 Neb. 610, 63 N. W. 41.

<sup>59</sup> *Owen v. McGehee*, 61 Ala. 440.

<sup>60</sup> *Stubbins v. Mitchell*, 82 Ky. 535.

<sup>61</sup> *Robertson v. Maxcey*, 36 Ky. (6 Dana) 101. Payment may be made by giving mortgages and confessing judgment. *Bishop v. Smith* (N. J. Sup. 1904) 57 Atl. 874. Or with bank notes. *Derosset v. Bradley*, 63 N. C. 17.

**BASIS OF CONTRIBUTION.**

165. Contribution will be based upon the amount actually paid in settlement of the debt, with interest and necessary expenses.

**SURETIES LIABLE PROPORTIONATELY.**

166. Co-sureties must contribute equally, unless they have assumed, expressly or impliedly, a different proportion of the liability.

**SURETY SEEKING CONTRIBUTION MUST HAVE PAID IN EXCESS OF HIS SHARE.**

167. A co-surety cannot have contribution until he has paid more than his proportionate share of the debt.

*Reimbursement Only from Co-Sureties.*

A co-surety will not be allowed to speculate on his co-sureties, any more than he will be allowed to speculate on his principal;<sup>62</sup> and, if he has settled the creditor's claim for less than its face value, the amount paid by him will form the basis of contribution.<sup>63</sup> If payment has been made in property, the actual value of the property forms the basis.<sup>64</sup>

<sup>62</sup> See ante, § 160.

<sup>63</sup> Owen v. McGehee, 61 Ala. 440; Williams v. Riehl, 127 Cal. 365, 59 Pac. 762, 78 Am. St. Rep. 60; Fuseller v. Babineau, 14 La. Ann. 764; Sinclair v. Redington, 56 N. H. 146; Morgan v. Smith, 70 N. Y. 537; Derosset v. Bradley, 63 N. C. 17; Byram v. McDowell, 15 Lea (Tenn.) 581; Gourdln v. Trenholm, 25 S. C. 362; Acers v. Curtis, 68 Tex. 423, 4 S. W. 551; Tarr v. Ravenscroft, 12 Grat. (Va.) 642; Lowell v. Edwards, 2 Bos. & Pul. 268.

<sup>64</sup> If payment has been made in lands, the value of the lands forms the basis of contribution. Jones v. Bradford, 25 Ind. 305. If in depreciated currency, as Confederate money, the actual and not the face value determines the amount. Edmonds v. Sheahan, 47 Tex. 443.

*Interest.*

The co-surety enforcing contribution will be entitled to interest on the amount due him from the date of payment down to the day that judgment is entered.<sup>65</sup>

*Expenses.*

The co-surety will be entitled to contribution for expenses necessarily incurred.<sup>66</sup> As it is the legal duty of a surety to pay the debt when it becomes due, he is not entitled to contribution for expenses of litigation, unless defense was undertaken in good faith,<sup>67</sup> as an act of prudence<sup>68</sup> against what seemed to be an improper demand by the creditor, or has resulted in a reduction of the creditor's claim,<sup>69</sup> or unless it was authorized by his co-sureties.<sup>70</sup> In such cases the right of contribution extends to attorney fees.<sup>71</sup>

If a judgment has been obtained against all of the sureties, without any defense being made, one of them, paying the judgment, is entitled to contribution toward the amount

<sup>65</sup> *Buckmaster v. Grundy*, 8 Ill. 626; *Moore v. Bruner*, 31 Ill. App. 400; *Breckinridge v. Taylor*, 5 Dana (Ky.) 110; *Rothschild v. Bowers*, 2 Rob. (La.) 380; *Titcomb v. McAllister*, 81 Me. 399; *Backus v. Coyne*, 45 Mich. 584, 8 N. W. 694; *Smith v. Mason*, 44 Neb. 610, 63 N. W. 41; *Campbell v. Mesier*, 6 Johns. Ch. (N. Y.) 21; *Aikin v. Peay*, 5 Strobb. 15, 53 Am. Dec. 684; *Gross v. Davis*, 87 Tenn. (3 Pickle) 226, 11 S. W. 92, 10 Am. St. Rep. 635; *Edmonds v. Sheahan*, 47 Tex. 443; *Welmer, Wright & Watkins v. Talbot*, 56 W. Va. 257, 49 S. E. 372; *Bushnell v. Bushnell*, 77 Wis. 435, 46 N. W. 442, 9 L. R. A. 411; *HITCHMAN v. STEWART*, *Drewry*, 271; 40 Cent. Dig. col. 2356.

<sup>66</sup> Necessary traveling expenses. *Preston v. Campbell*, 3 Hayw. (Tenn.) 20.

<sup>67</sup> *Van Winkle v. Johnson*, 11 Or. 469, 5 Pac. 922, 50 Am. Rep. 495; *Boutin v. Etsell*, 110 Wis. 276, 85 N. W. 964.

<sup>68</sup> *Wagenseller v. Prettyman*, 7 Ill. App. (7 Bradw.) 192; *Bosley v. Taylor*, 35 Ky. (5 Dana) 157, 30 Am. Dec. 677; *Davis v. Emerson*, 17 Me. (5 Shep.) 64; *Backus v. Coyne*, 45 Mich. 584, 8 N. W. 694; *McKee v. Campbell*, 27 Mich. 497; *Gross v. Davis*, 87 Tenn. (3 Pickle) 226, 11 S. W. 92, 10 Am. St. Rep. 635; *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. Dec. 98.

<sup>69</sup> *Connolly v. Dolan*, 22 R. I. 60, 46 Atl. 36, 84 Am. St. Rep. 816; *McKenna v. George*, 2 Rich. Eq. (S. C.) 15; *WOLMERSHAUSEN v. GULLICK*, [1893] 2 Ch. 514.

<sup>70</sup> *Comegys v. State Bank*, 6 Ind. 357; *Hichborn v. Fletcher*, 66 Me. 209, 22 Am. Rep. 562.

<sup>71</sup> *Gross v. Davis*, 87 Tenn. 226, 11 S. W. 92, 10 Am. St. Rep. 635.

required to satisfy the judgment, although such amount includes the costs of the suit,<sup>72</sup> as the failure to pay, which occasioned the costs, was imputable to one as much as to the other;<sup>73</sup> and a surety who is compelled to bring suit to enforce contribution from a co-surety denying his right thereto must be allowed the costs of that action.<sup>74</sup>

*Apportionment of Liability.*

In the absence of express agreement, co-sureties, who become such in the same instrument, must contribute in proportion to their whole number.<sup>75</sup> If there be two co-sureties, each would be equitably liable for one-half; if there be three, each would be equitably liable for one-third, and so on.

If, the co-sureties are on different instruments, for different amounts, their equitable share will be proportionate to the amounts called for in the different instruments.<sup>76</sup> Thus, if an officer should give two bonds, one for \$12,000, and the other for \$6,000, the sureties would be liable for contribution in proportion to the amount their bond bears to the entire amount. If A. and B. were sureties on the first bond, and C. and D. on the second, and A. should pay the entire amount called for by his bond (\$12,000) in full settlement of the obligee's claim, he could compel B. to contribute one-third (\$4,000), and C. and D. each one-sixth (\$2,000); A. himself being equitably liable for one-third.<sup>77</sup>

<sup>72</sup> *Security Ins. Co. v. St. Paul Co.*, 50 Conn. 233; *Love v. Gibson*, 2 Fla. 598; *Newcomb v. Gibson*, 127 Mass. 396; *Bright v. Lennon*, 83 N. C. 183; *Foster v. Johnson*, 5 Vt. 60; *Harper v. Knowlson*, 2 Up. Can. E. & A. 253; *Kemp v. Finden*, 12 Mees. & W. 421.

<sup>73</sup> *DAVIS v. EMERSON*, 17 Me. 64.

<sup>74</sup> *HITCHMAN v. STEWART*, 3 Drewry, 271.

<sup>75</sup> *McDaniel v. Lee*, 37 Mo. 204. The fact that a co-surety is indemnified by the principal does not make him liable for any more than his proportion. *Taylor v. Savage*, 12 Mass. 98.

<sup>76</sup> *McBRIDE v. POTTER-LOVELL CO.*, 169 Mass. 7, 47 N. E. 242, 61 Am. St. Rep. 285; *Gould v. Central Trust Co.*, 6 Abb. N. C. (N. Y.) 381; *Jones v. Blanton*, 41 N. C. 115, 51 Am. Dec. 415; *In re McDonaghs, Jr.* 10 Eq. 269. Where several stockholders sign as sureties for the corporation, recovery will be based on their number, and not on the amount of stock held by them, as they sign as individuals. *Coburn v. Wheelock*, 34 N. Y. 440.

<sup>77</sup> *Chipman v. Morrill*, 20 Cal. 130; *Loring v. Bacon*, 57 Mass. (3 Cush.) 465; *Young v. Shunk*, 80 Minn. 503, 16 N. W. 402; *Armitage*

portionate share to A., and then seek indemnity from the principal, and not try to gain advantage from his neglect in reimbursing his co-surety, who has paid the debt.

**ACTION FOR CONTRIBUTION—PLAINTIFFS.**

168. Two or more co-sureties cannot join, at law, in bringing an action for contribution, unless payment has been made from a joint fund.

**SAME—DEFENDANTS.**

169. At law each co-surety must be sued in a separate action; but in equity all the co-sureties from whom contribution is sought may be joined as defendants.

**SAME—FORM AT LAW.**

170. At law an action of assumpsit on the implied promise may be brought by one co-surety to enforce contribution from another; or, if the plaintiff has taken an assignment of the creditor's claim, that may be enforced against the co-surety to the extent of the amount due from him.

**SAME—AMOUNT RECOVERABLE.**

171. At law each co-surety is liable for his exact aliquot proportion only; but in equity the burden must be borne proportionately by all the solvent co-sureties within the jurisdiction.

*Parties Plaintiff.*

If one co-surety has paid more than his proportionate share, and another has done the same, they cannot unite as plaintiffs, at law, in bringing a suit to enforce contribution from another co-surety who has not paid anything,\*\* as the liability is several, the implied promise being made to each individually to reimburse him as soon as he has paid anything in

\*\* *Lombard v. Cobb*, 14 Me. 222.



excess of his share;<sup>87</sup> but, if two or more co-sureties have made payment jointly, they can unite as plaintiffs or complainants.<sup>88</sup> Payment will be deemed to have been made jointly when the co-sureties seeking contribution have joined in giving a note to raise all<sup>89</sup> or a part<sup>90</sup> of the funds for that purpose; or if, instead of each paying separately, they have placed the money in the hands of one who pays for them all at one time, the payment is joint,<sup>91</sup> as their right of action against a co-surety arises at the same instant. Co-sureties who have paid jointly are not required, however, to join in an action for contribution.<sup>92</sup>

In equity co-sureties may unite as complainants in a bill for contribution.<sup>93</sup>

*Parties Defendant.*

If contribution be sought in a common-law court, each co-surety from whom contribution is desired must be made the defendant in a separate action,<sup>94</sup> as the promise is implied from each individually; but, if the action be brought in a chancery court, all the solvent co-sureties within the jurisdiction must be united as defendants,<sup>95</sup> as the method of procedure differs from that at common law, and allows and requires all those directly interested in resisting the relief prayed for in the bill, or granted by the decree, to be made parties.<sup>96</sup>

<sup>87</sup> For a similar rule, when the sureties seek indemnity from the principal, see ante, § 157.

<sup>88</sup> *Dussol v. Brugulere*, 50 Cal. 456; *Powell v. Matthis*, 26 N. C. 83, 40 Am. Dec. 427; *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. Dec. 98.

<sup>89</sup> *Adams v. De Frehn*, 27 Pa. Super. Ct. 184; *Prescott v. Newell*, 39 Vt. 82.

<sup>90</sup> *Atkinson v. Stewart*, 2 B. Mon. (Ky.) 348.

<sup>91</sup> *Clapp v. Rice*, 15 Gray (Mass.) 557, 77 Am. Dec. 387.

<sup>92</sup> *Hull v. Myers*, 90 Ga. 674, 16 S. E. 653; *Atkinson v. Thayer*, 2 B. Mon. (Ky.) 348.

<sup>93</sup> *Young v. Lyons*, 8 Gill (Md.) 162; *Smith v. Rumsey*, 33 Mich. 183; *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. Dec. 98.

<sup>94</sup> *Powell v. Matthis*, 26 N. C. 83, 40 Am. Dec. 427. The principal and a co-surety cannot be joined as defendants in an action at law. *Burnham v. Choat*, 5 Up. Can. K. B. (O. S.) 736.

<sup>95</sup> *Johnson's Adm'r v. Vaughn*, 65 Ill. 425; *Young v. Lyons*, 8 Gill (Md.) 162; *Adams v. Hayes*, 120 N. C. 383, 27 S. E. 47; *Thompson v. Hibbs*, 45 Or. 141, 76 Pac. 778; *Bruce v. Bickerton*, 18 W. Va. 342.

<sup>96</sup> *Shipman*, Eq. Pl. p. 13.

In addition to the co-sureties from whom contribution is desired, it is proper to include the principal<sup>97</sup> and insolvent co-sureties as parties defendant, and a decree can be entered against the latter to enforce their liability if they afterwards become financially responsible.<sup>98</sup> If one co-surety be dead, it is proper to make his personal representative a party defendant.<sup>99</sup> Nonresident co-sureties cannot be made parties.<sup>100</sup>

*Form of Action.*

If the action be brought on the promise implied by law, *indebitatus assumpsit* for money paid<sup>101</sup> is proper; but, if the surety has taken an assignment of the creditor's claim,<sup>102</sup> suit may be brought on that.<sup>103</sup>

*Allegations and Averments.*

At law it is not necessary, in most states, to allege or prove the insolvency of the principal;<sup>104</sup> but, as an action in equity cannot be brought if the principal is insolvent, the bill should

<sup>97</sup> *Chrisman v. Jones*, 34 Ark. 73; *Johnson's Adm'r v. Vaughn*, 65 Ill. 425; *Daniel v. Ballard*, 2 Dana (Ky.) 296; *Byers v. McClanahan*, 6 Gill & J. (Md.) 250; *Stone v. Buckner*, 12 Smedes & M. (20 Miss.) 73; *Allen v. Wood*, 38 N. C. 386; *Fischer v. Galtner*, 32 Or. 161, 51 Pac. 736; *McCormack's Adm'r v. O'Bannon*, 3 Munf. (Va.) 484, 5 Am. Dec. 509. The principal cannot raise the objection that, as to him, there is an adequate remedy at law. *Trescott v. Smyth*, 1 McCord, Eq. (S. C.) 301.

<sup>98</sup> *EASTERLY v. BARBER*, 66 N. Y. 433. See *Shipman*, Eq. Pl. p. 36.

<sup>99</sup> *Dussol v. Brugulere*, 50 Cal. 456.

<sup>100</sup> *Jones v. Blanton*, 41 N. C. 115, 51 Am. Dec. 415.

<sup>101</sup> *Porter v. Horton*, 80 Ill. App. 333; *Bachelder v. Fiske*, 17 Mass. 464; *Powell v. Edwards*, 2 Bos. & Pul. 267.

<sup>102</sup> See ante, c. V, note 835.

<sup>103</sup> *Blackman v. Joiner*, 81 Ala. 344, 1 South. 851; *Howland v. White*, 48 Ill. App. 236; *Brought v. Griffith*, 16 Iowa, 26; *Stratton v. Heuser*, 19 Ky. Law Rep. 1019, 42 S. W. 1133; *Martindale v. Brock*, 41 Md. 571; *Kimmel v. Lowe*, 28 Minn. 265, 9 N. W. 764; *Eaton v. Lambert*, 1 Neb. 339; *WRIGHT v. GROVER*, 82 Pa. 80; *Cochran v. Shields*, 2 Grant, Cas. (Pa.) 437; *United States v. Bunker*, 4 Wash. C. C. (U. S.) 446, Fed. Cas. No. 16,087.

<sup>104</sup> *Buckner's Adm'r v. Stewart*, 34 Ala. 529; *Taylor v. Reynolds*, 53 Cal. 686; *Sloo v. Pool*, 15 Ill. 47; *Rankin v. Collins*, 50 Ind. 158; *Goodall v. Wentworth*, 20 Me. 322; *Mosely v. Fullerton*, 59 Mo. App. 143; *Smith v. Mason*, 44 Neb. 610, 63 N. W. 41; *Odlin v. Greenleaf*, 3 N. H. 270; *Lucas v. Guy*, 2 Bailey (S. C.) 403. Contra, *Morrison*

allege his insolvency,<sup>106</sup> or the insolvency of his estate if he is dead,<sup>106</sup> and the insolvency, absence, or death of co-sureties,<sup>107</sup> if such are the facts.

*Proportion Recoverable.*

If the action be brought in a common-law court, all that can be recovered from the defendant is his exact proportionate share, to be ascertained by dividing the creditor's claim by the entire number of co-sureties;<sup>108</sup> but in chancery the indebtedness is apportioned among the solvent co-sureties.<sup>109</sup>

v. Poyntz, 7 Dana (Ky.) 307, 32 Am. Dec. 92; Glasscock v. Hamilton, 62 Tex. 143.

<sup>106</sup> Daniel v. Ballard, 2 Dana (Ky.) 296; Rainey v. Yarborough, 37 N. C. 249, 38 Am. Dec. 681; Fischer v. Gaither, 32 Or. 161, 51 Pac. 736; Gross v. Davis, 87 Tenn. 226, 11 S. W. 92, 10 Am. St. Rep. 637; McCormack's Adm'r v. Obannon, 8 Munf. (Va.) 484, 5 Am. Dec. 509.

<sup>106</sup> Conover v. Hill, 76 Ill. 342; Harris v. Douglass, 64 Ill. 466; Van Demark v. Van Demark, 13 How. Prac. (N. Y.) 373.

<sup>107</sup> Stone v. Buckner, 12 Smedes & M. (Miss.) 73.

<sup>108</sup> Chipman v. Morrill, 20 Cal. 130; Sloo v. Pool, 15 Ill. 48; MOORE v. BRUNER, 31 Ill. App. 400; Morrison v. Poyntz, 7 Dana (Ky.) 307, 32 Am. Dec. 92; Young v. Lyons, 8 Gill (Md.) 162; Griffin v. Kelleher, 132 Mass. 82; Bridgden v. Cheever, 10 Mass. 450; Dodd v. Winn, 27 Mo. 501; Stothoff v. Dunham, 19 N. J. Law, 181; EASTERLY v. BARBER, 66 N. Y. 433; Samuel v. Zachery, 26 N. C. 377; Fischer v. Gaither, 32 Or. 161, 51 Pac. 736; Croft v. Moore, 9 Watts (Pa.) 451; Gross v. Davis, 87 Tenn. 226, 11 S. W. 92, 10 Am. St. Rep. 635; Acers v. Curtis, 68 Tex. 423, 4 S. W. 551; Tarr v. Ravenscroft, 12 Grat. (Va.) 642; BATARD v. HAWES, 2 El. & Bl. 287; COWELL v. EDWARDS, 2 Bos. & P. 268. The last case cited, decided in 1800, seems to be one of the first cases in which contribution was allowed in a common-law court.

<sup>109</sup> Young v. Clark, 2 Ala. 204; Burroughs v. Lott, 19 Cal. 125; North v. Brace, 30 Conn. 60; Hayden v. Thrasher, 18 Fla. 795; Johnson's Adm'r v. Vaughn, 65 Ill. 425; Klein v. Mather, 2 Gilman (Ill.) 317; Newton v. Pence, 10 Ind. App. 672, 38 N. E. 484; Cobb v. Haynes, 47 Ky. (8 B. Mon.) 137; Young v. Lyons, 8 Gill (Md.) 162; Griffin v. Kelleher, 132 Mass. 82; Cary v. Holmes, 16 Gray (Mass.) 127; Stewart v. Goulden, 52 Mich. 143, 17 N. W. 731; Dodd v. Winn, 27 Mo. 501; Smith v. Mason, 44 Neb. 610, 63 N. W. 41; Villet v. Wyckoff, 42 N. J. Eq. 642, 9 Atl. 679; Weed v. Calkins, 24 Hun, 582; Powell v. Matthis, 26 N. C. 83, 40 Am. Dec. 427; Harris v. Ferguson, 2 Bailey (S. C.) 397; Gross v. Davis, 87 Tenn. 226, 11 S. W. 92, 10 Am. St. Rep. 635; Acers v. Curtis, 68 Tex. 423, 4 S. W. 551; Marsh v. Harrington, 18 Vt. 150; Robertson v. Trigg, 32 Grat. (Va.) 76;



within the jurisdiction.<sup>110</sup> If, however, the insolvency of one of the co-sureties has arisen during a delay caused by the act of the co-surety seeking contribution, he cannot compel solvent sureties to contribute more on account of such insolvency.<sup>111</sup>

#### DEFENSES.

**172. When contribution is sought from a co-surety, he may set up in his defense that—**

- (a) The defendant lacks capacity.
- (b) The plaintiff has not paid the debt, or did not make payment with his own funds.
- (c) The plaintiff's payment was voluntary.
- (d) The defendant has paid his proportionate share.
- (e) The plaintiff expressly or impliedly promised to indemnify the defendant.
- (f) The defendant has been discharged by the plaintiff's relinquishing or losing security for the debt, or depriving the defendant of his remedy against the principal.
- (g) The liability arose through the wrongful act of the plaintiff.
- (h) The defendant had been discharged by the creditor.
- (i) The defendant has been released.
- (j) The defendant has been discharged in bankruptcy.
- (k) The liability of the defendant is barred.

#### COUNTERCLAIM.

**173. When contribution is sought from a co-surety, he may set off or recoup a claim which he has against the plaintiff.**

##### *Incapacity.*

A co-surety can resist contribution successfully, by showing that he lacked legal capacity to enter into the contract;

*Faurot v. Gates*, 86 Wis. 569, 57 N. W. 294; *McKelvey v. Davis*, 17 Grant, Ch. 355; *HITCHMAN v. STEWART*, 3 Drewry, 271; *SWAIN v. WALL*, [1642] 1 Rep. Ch. 149; *PETER v. RICH*, [1629] 1 Rep. Ch. 34.

<sup>110</sup> *Security Ins. Co. v. St. Paul Co.*, 50 Conn. 233; *Bosley v. Taylor*, 35 Ky. (5 Dana) 157, 30 Am. Dec. 677; *Stewart v. Goulden*, 52 Mich. 143, 17 N. W. 731; *Currier v. Baker*, 51 N. H. 613; *Jones v. Blanton*, 41 N. C. 115, 51 Am. Dec. 415; *McKenna v. George*, 2 Rich. Eq. (S. C.) 15; *Liddell v. Wiswell*, 59 Vt. 365, 8 Atl. 680; *Faurot v. Gates*, 86 Wis. 569, 57 N. W. 294.

<sup>111</sup> *Preston v. Preston*, 4 Grat. (Va.) 88, 47 Am. Dec. 717.

as, where a corporation is the co-surety, that such act was *ultra vires*.<sup>112</sup>

*Nonpayment by Plaintiff.*

A co-surety can show, as a complete defense, or in reduction of the plaintiff's claim, that the latter either did not pay at all,<sup>113</sup> or that he made payment with the principal's funds.<sup>114</sup> But, where a surety's property has been taken in satisfaction of the debt, it cannot be said that he has not made payment because he afterwards acquires the identical property through a devise.<sup>115</sup> Where the co-surety, seeking contribution, has received security, and has converted the security into money, the defendant will be entitled to have such proceeds applied to the claim of the plaintiff;<sup>116</sup> but it is no defense that the plaintiff is indebted to the principal,<sup>117</sup> unless the plaintiff is insolvent.

<sup>112</sup> *Lucas v. White Line Co.*, 70 Iowa, 541, 30 N. W. 771, 59 Am. Rep. 449. For similar defense as between surety and principal, see ante, § 159 (b).

<sup>113</sup> See *Cockayne v. Sumner*, 22 Pick. (Mass.) 117.

<sup>114</sup> *Silvey v. Dowell*, 53 Ill. 260; *Wolcott v. Hagerman*, 50 N. J. Law, 289, 13 Atl. 605. Where a co-surety purchases the property of the principal at nominal prices, under an execution on a judgment against all, he loses his right of contribution if the property of the principal, at a fair and reasonable valuation, exceeds the debt. The property of the principal is a common fund for the protection of all, and the utmost good faith is required. The purchasing co-surety becomes a trustee of the property purchased by him, and cannot avail himself of any advantage to his profit. *SANDERS v. WEELBURG*, 107 Ind. 266, 7 N. E. 573; *Livingston's Ex'rs v. Van Rensselaer*, 6 Wend. (N. Y.) 63; *Dennis v. Gillespie*, 24 Miss. 581.

<sup>115</sup> *Caldwell v. Roberts*, 31 Ky. (1 Dana) 355.

<sup>116</sup> *Steele v. Mealing*, 24 Ala. 285; *Gibson v. Shehan*, 5 App. D. C. 391; *Whiteman v. Harriman*, 85 Ind. 49; *Hoover v. Mowrer*, 84 Iowa, 43, 50 N. W. 62, 35 Am. St. Rep. 293; *Morrison v. Poyntz*, 7 Dana (Ky.) 307, 32 Am. Dec. 92; *Bachelder v. Fiske*, 17 Mass. 464; *Doolittle v. Dwight*, 43 Mass. (2 Metc.) 561; *Harrison v. Phillips* 46 Mo. 520; *Currier v. Fellows*, 27 N. H. 366; *Wolcott v. Hagerman*, 50 N. J. Law, 289, 13 Atl. 605; *Fagan v. Jacobs*, 15 N. C. 263; *Agnew v. Bell*, 4 Watts (Pa.) 31; *Hinsdill v. Murray*, 6 Vt. 136. And see note 42, *supra*.

<sup>117</sup> *DAVIS v. TOULMIN*, 77 N. Y. 280; *O'Brien v. Karing*, 57 N. Y. 649.

*Voluntary Payments.*

A co-surety, who has paid the debt with full knowledge of facts showing that legal liability did not exist, cannot have contribution,<sup>118</sup> although he was ignorant of the legal effect of such facts;<sup>119</sup> but if he pay in good faith, without knowledge of the facts, he is entitled to contribution.<sup>120</sup> Thus, payment by a co-surety after the claim has been barred as to all of the sureties would be a voluntary payment;<sup>121</sup> but payment of a note void on account of illegality would entitle a co-surety to contribution, if he did not know of the facts which made the transaction illegal.<sup>122</sup> If his co-sureties were aware of the facts, they should have acquainted him therewith.<sup>123</sup>

A judgment against the surety seeking contribution and the one from whom contribution is sought is conclusive as to the liability of the latter.<sup>124</sup>

If one co-surety, by his payment, has prevented the occurrence of the very contingency upon the happening of

<sup>118</sup> *Halsey v. Murray*, 112 Ala. 185, 20 South. 575; *Curtis v. Parks*, 55 Cal. 106; *Skillin v. Merrill*, 16 Mass. 40; *Russell v. Failor*, 1 Ohio St. 327, 59 Am. Dec. 631; *Briggs v. Hinton*, 14 Lea (Tenn.) 233. See, also, ante, § 159 (c), as to the liability of the principal to a surety where payment of the latter is voluntary; and see note 154, *infra*, as to the effect of payment by a co-surety after the principal has been released by the creditor.

<sup>119</sup> *Bancroft v. Abbott*, 3 Allen (Mass.) 524.

<sup>120</sup> *Cave v. Burns*, 6 Ala. 780; *WARNER v. MORRISON*, 3 Allen (Mass.) 566; *Hichborn v. Fletcher*, 66 Me. 209, 22 Am. Rep. 562.

<sup>121</sup> *Machado v. Fernandez*, 74 Cal. 362, 16 Pac. 19; *Shelton v. Farmer*, 9 Bush (Ky.) 314; *Hatchett v. Pegram*, 21 La. Ann. 722; *Godfrey v. Rice*, 59 Me. 308; *Hooper v. Hooper*, 81 Md. 155, 31 Atl. 508, 48 Am. St. Rep. 496; *Singleton v. Townsend*, 45 Mo. 379; *Green v. Milbank*, 56 How. Prac. (N. Y.) 382; *Wheatfield Tp. v. Brush Valley*, 25 Pa. 112; *Cocke v. Hoffman*, 73 Tenn. (5 Lea) 105, 40 Am. Rep. 23; *Turner's Adm'r v. Thom*, 89 Va. 745, 17 S. E. 323.

<sup>122</sup> *WARNER v. MORRISON*, 3 Allen (Mass.) 566.

<sup>123</sup> *Love v. Gibson*, 2 Fla. 598.

<sup>124</sup> *Waller v. Campbell*, 25 Ala. 544; *Rice v. Rice*, 14 B. Mon. (Ky.) 417; *Konitzky v. Meyer*, 49 N. Y. 571. If the co-surety from whom contribution is sought was not a party to the suit in which judgment was obtained, such judgment is *prima facie* evidence only. *Breckinridge v. Taylor*, 5 Dana (Ky.) 110; *KOELSCH v. MIXER*, 52 Ohio St. 207; 39 N. E. 417; *Hoxie v. Bank*, 20 Tex. Civ. App. 462, 49 S. W. 637.

which the sureties were to become liable, he is not entitled to contribution; for they never have become liable in accordance with the terms of their undertaking.<sup>125</sup> Thus, where a bond was given to pay the obligee such damages as he might sustain by reason of a default by the principal, and certain co-sureties, by their payments, prevented the obligee from sustaining any damage, there was no breach of the bond; hence, no liability on the part of the sureties, and no right of contribution.

*Waiver of Defenses Does Not Make Payment Voluntary.*

Payment will not be deemed voluntary where the co-surety making payment waives a defense of which he might take advantage, but which is not available to the co-surety from whom contribution is sought.<sup>126</sup> Thus, where an alteration was made in a note after one surety signed it, he has the right to ratify the act, and, upon payment of the note, can have contribution from a surety who signed the note after the alteration was made.<sup>127</sup>

*Surety's Liability Exhausted.*

After a co-surety has paid his full proportionate share of the debt, he cannot be compelled to pay more, even to one who has paid in excess of his share. The plaintiff's remedy, in such a case, is against the co-sureties who have not paid their proportionate shares.

*Express Agreement Restricting Liability.*

Where one co-surety has promised expressly<sup>128</sup> to indemnify another, the former cannot have contribution from the

<sup>125</sup> Ladd v. Chamber of Commerce, 37 Or. 49, 60 Pac. 713, 61 Pac. 1127, 62 Pac. 208.

<sup>126</sup> A surety may waive the statute of limitations as a personal defense. McClatchie v. Durham, 44 Mich. 435, 7 N. W. 76; Jones v. Blanton, 41 N. C. 115, 51 Am. Dec. 415. Unless the claim was barred as to the co-surety also. See note 121, supra.

<sup>127</sup> Houck v. Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727.

<sup>128</sup> In some cases it is held that there is an implied promise of indemnity if a person becomes co-surety with another upon the latter's request. Daniel v. Ballard, 32 Ky. (2 Dana) 296; Byers v. McClanahan, 6 Gill & J. (Md.) 250; Taylor v. Savage, 12 Mass. 98; Cutter v. Emery, 37 N. H. 567; TURNER v. DAVIES, 2 Esp. 479. There does not seem to be any very good reason for the rule, and the contrary has been held in the following cases: Bagott v. Mullen,

latter in violation of his agreement;<sup>129</sup> but the latter, upon being compelled to make payment, could recover the entire amount from the former. An agreement to indemnify a surety can be shown by oral evidence, and is a complete defense to an action for contribution.<sup>130</sup>

*Relinquishment or Loss of Security.*

If the principal has given one co-surety security, which he has relinquished,<sup>131</sup> or which, by any act of his or his failure to act, has been depreciated or lost,<sup>132</sup> he loses his right to contribution to the extent of the value of the security so relinquished or lost;<sup>133</sup> and such value, prima facie, will be its full value.<sup>134</sup> It is immaterial that the release of such security was without any intention to injure the co-surety. It is regarded as constructive fraud to deprive a co-surety of the means of indemnity on which the latter had a right to rely.<sup>135</sup> Each surety is entitled to the benefit of any security given by the principal to another surety at any time after they have

82 Ind. 332, 2 Am. Rep. 351; McKee v. Campbell, 27 Mich. 497; Burnett v. Millsaps, 59 Miss. 333; Bishop v. Smith (N. J. Sup. 1904) 57 Atl. 874.

<sup>129</sup> Hayden v. Thrasher, 18 Fla. 795; Horn v. Bray, 51 Ind. 555, 19 Am. Rep. 742; Jones v. Letcher, 13 B. Mon. (Ky.) 363; Blake v. Cole, 22 Pick. (Mass.) 97; Apgar's Adm'r v. Hiller, 24 N. J. Law (4 Zab.) 812; Wells v. Miller, 66 N. Y. 255; Barry v. Ransom, 12 N. Y. 462; Anderson v. Peareson, 2 Bailey (S. C.) 107; Martin v. Marshall, 60 Vt. 321, 13 Atl. 420; Rae v. Rae, 6 Ir. Ch. 490.

<sup>130</sup> See note 39, supra.

<sup>131</sup> Taylor v. Morrison, 26 Ala. 728, 62 Am. Dec. 747; Boyer v. Marshall, 8 N. Y. St. Rep. 233. For similar rules as to the relinquishment or loss of securities by the creditor affecting his right to recover from a surety, see ante, § 127.

<sup>132</sup> Steele v. Mealing, 24 Ala. 285; Simmons v. Camp, 71 Ga. 54; Teeter v. Pierce, 11 B. Mon. (Ky.) 399; Schmidt v. Coulter, 6 Minn. 492 (Gil. 340); Chilton's Adm'r v. Chapman, 13 Mo. 470; Crisfield v. Murdock, 127 N. Y. 315, 27 N. E. 1046; Kerns v. Chambers, 38 N. C. 576; Neely v. Bee, 32 W. Va. 519, 9 S. E. 898.

<sup>133</sup> Frink v. Peabody, 26 Ill. App. 390; SANDERS v. WHEELBURG, 107 Ind. 266, 7 N. E. 573; Roberts v. Sayre, 22 Ky. (6 T. B. Mon.) 188; Chilton's Adm'r v. Chapman, 13 Mo. 470; Ramsey v. Lewis, 30 Barb. (N. Y.) 403.

<sup>134</sup> PAULIN v. KAIGHN, 29 N. J. Law, 480.

<sup>135</sup> PAULIN v. KAIGHN, 29 N. J. Law, 480; Fielding v. Waterhouse, 8 Jones & S. (N. Y.) 424.

become co-sureties; and it is immaterial whether the security was relinquished before or after the debt became due.<sup>136</sup>

Although, in general, if the principal has given a co-surety a mortgage as security, which the latter has allowed to become valueless by neglecting to record it, the right of such a co-surety to contribution is affected, his rights will be preserved if his failure to record the mortgage was the result of an agreement with the principal that he would not do so.<sup>137</sup> He would be bound by his agreement, and his co-sureties would not have any greater rights than he; nor is one co-surety entitled to the benefit of any security given by the principal to another co-surety, unless it has been given, in part at least, to indemnify the latter against the debt for which both sureties are liable.<sup>138</sup>

A co-surety, in good faith, can exchange one security for another without losing any of his rights;<sup>139</sup> but, when security has been disposed of by a co-surety, the burden is on him, before allowing him to have contribution, to show that such disposition was proper.<sup>140</sup> If the relinquishment of collateral security does not cause any injury to the co-surety, his liability to contribution is not affected.<sup>141</sup>

*Interference with Co-Surety's Rights.*

As a surety, upon payment of the debt or any part of it after it is due, has the right to recover from the principal the amount so paid, one co-surety, who has interfered with this right in another co-surety, cannot have contribution from the latter. Thus, a release of the principal from indemnity by a co-surety who has paid the debt would take away his right to contribution.<sup>142</sup> So would a binding agreement for an extension of time given to the principal by one co-surety without the consent

<sup>136</sup> PAULIN v. KAIGHN, 29 N. J. Law, 480.

<sup>137</sup> White v. Carlton, 52 Ind. 371.

<sup>138</sup> Higgins v. Morrison, 4 Dana (Ky.) 100. The burden is on the one releasing securities to show that they were for another claim. PAULIN v. KAIGHN, 29 N. J. Law, 480.

<sup>139</sup> Carpenter v. Kelly, 9 Ohio (9 Ham.) 106.

<sup>140</sup> PAULIN v. KAIGHN, 29 N. J. Law, 480.

<sup>141</sup> North Ave. Sav. Bank v. Hayes, 188 Mass. 135, 74 N. E. 311.

<sup>142</sup> Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98; Draughan v. Bunting, 31 N. C. 10.



of the others;<sup>143</sup> but if one of three co-sureties, who has paid the debt, releases one of the other two, this would furnish no defense to the third so far as his liability for one-third of the debt is concerned.<sup>144</sup>

#### *Wrongful Acts.*

A co-surety may deprive himself of the right to contribution by his wrongful conduct or by his own default.<sup>145</sup> Thus, where a deputy sheriff was a surety upon the bond of the sheriff, and the deputy, as surety, had been compelled to pay for a default of the sheriff arising from the wrongful act of the deputy, he had no equitable right to contribution from the other sureties on the sheriff's bond.<sup>146</sup> So, a surety on the bond of an executor could not have contribution for a default of the principal arising from failure of such surety to pay money which he was owing to the estate;<sup>147</sup> and a co-surety for the repayment of a loan, who, by a secret arrangement with the principal, receives a portion of the funds, is not entitled to contribution.<sup>148</sup>

It is not sufficient, however, to relieve a co-surety from contribution, that the default of the principal has resulted from a moral wrong of the surety seeking contribution, if the latter has not violated any legal duty. Thus, a co-surety is liable, though the surety seeking contribution encouraged the principal in gambling to such an extent that it was evident that the principal could not support himself in his extravagance and faithfully account as collector of customs.<sup>149</sup>

<sup>143</sup> *Boughton v. Bank of Orleans*, 2 Barb. Ch. (N. Y.) 458; *Beckham v. Pride*, 6 Rich. Eq. (S. C.) 78; *Brown v. McDonald*, 8 Yerg. (Tenn.) 158, 29 Am. Dec. 112. As to a binding extension of time given by the creditor, releasing a surety, see ante, § 108.

<sup>144</sup> *Currier v. Baker*, 51 N. H. 613; *Murphy v. Gage* (Tex. Civ. App.) 21 S. W. 396.

<sup>145</sup> *Scofield v. Gaskill*, 60 Ga. 277; *Dennis v. Gillespie*, 24 Miss. 581; *Crisfield v. Murdock*, 127 N. Y. 315, 27 N. E. 1046; *Commonwealth v. Cooper*, 149 Pa. 239, 24 Atl. 339; *Flanagan v. Duncan*, 133 Pa. 373, 19 Atl. 405, 7 L. R. A. 412.

<sup>146</sup> *Block v. Estes*, 92 Mo. 318, 4 S. W. 731.

<sup>147</sup> *ESHLEMAN v. BOLENIUS*, 144 Pa. 269, 22 Atl. 758.

<sup>148</sup> *McPherson v. Talbott*, 10 Gill & J. (Md.) 490, 32 Am. Dec. 191.

<sup>149</sup> *DEERING v. WINCHELSEA*, 2 Bos. & P. 270, 1 Cox, 319.

*Discharge by Creditor.*

If a surety, who has consented<sup>150</sup> to the release of a co-surety by the creditor,<sup>151</sup> afterwards pays the debt, he cannot have contribution from the co-surety so released; or, if one co-surety has been released by operation of law, he cannot be compelled to contribute. Thus, where the creditor has failed to bring suit against the principal upon receipt of statutory notice from one co-surety, the latter is released as to every one.<sup>152</sup>

As a release of the principal releases the sureties by operation of law,<sup>153</sup> one co-surety, upon payment of the debt thereafter, is not entitled to contribution.<sup>154</sup>

*Release by Co-Surety.*

If the co-surety seeking contribution has released the other for a consideration, such release will be a sufficient defense.<sup>155</sup>

*Bankruptcy.*

If, after one co-surety has paid the debt, another co-surety is discharged in bankruptcy, the latter will be freed from liability to contribution;<sup>156</sup> but, if payment has been made by

<sup>150</sup> It has been held, in some cases, that the release of one co-surety without the consent of the other will not discharge him from liability to contribute. *Hill v. Morse*, 61 Me. 541; *Clapp v. Rice*, 81 Mass. (15 Gray) 557, 77 Am. Dec. 387; *Boardman v. Paige*, 11 N. H. 431.

<sup>151</sup> *Bouchaud v. Dias*, 3 Denio (N. Y.) 238; *Moore v. Isley*, 22 N. C. 372.

<sup>152</sup> *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606; *Trustees of Schools v. Southard*, 31 Ill. App. 359; *Letcher's Adm'r v. Yantis*, 33 Ky. (3 Dana) 160; *KLINGENSMITH v. KLINGENSMITH*, 31 Pa. 460.

<sup>153</sup> Ante, § 132 (c).

<sup>154</sup> *Boughton v. Bank of Orleans*, 2 Barb. Ch. (N. Y.) 458; *Tobias v. Rogers*, 2 Edm. Sel. Cas. 168; *Draughan v. Bunting*, 31 N. C. 10. Where a surety pays with knowledge of a covenant on the part of the obligee not to sue a co-surety, he will not be entitled to contribution. *Craven v. Freeman*, 82 N. C. 361.

<sup>155</sup> It is a sufficient consideration for the release that the co-surety from whom contribution is sought, upon request of the co-surety seeking contribution, procured the payment of a stipulated sum by the insolvent principal. *Warren v. Whitesides*, 34 Miss. 171.

<sup>156</sup> A surety can prove the whole claim against a bankrupt co-surety, until the latter's proportionate share has been paid. This



one co-surety after such discharge, his right to contribution from the discharged bankrupt, will exist,<sup>157</sup> as, until payment, he did not have any claim which he could have presented against the bankrupt's estate.

#### *Statute of Limitations.*

If a co-surety, after payment of the debt, waits until the statute of limitations has run, his right to enforce contribution will be lost;<sup>158</sup> but it is no defense to a co-surety, from whom contribution is sought, that the creditor could not have enforced payment from him because the statute had run, if the co-surety making payment could not have set up that defense against the creditor.<sup>159</sup> The statute does not run against the right to demand contribution until payment has been made in excess of the paying surety's proportionate share, for it is

is no injustice to other creditors of the bankrupt, as the creditor could have proved the whole claim. *Hess' Estate*, 69 Pa. 272; *PACE v. PACE*, 95 Va. 792, 30 S. E. 361, 44 L. R. A. 459. *Contra*, *New Bedford Inst. for Savings v. Hathaway*, 134 Mass. 69, 45 Am. Rep. 289. See ante, § 159 (g), as to defense of bankruptcy between surety and principal.

<sup>157</sup> *Reitz v. People*, 72 Ill. 435; *Byers v. Alcorn*, 6 Ill. App. (6 Bradw.) 39; *Dunn v. Sparks*, 1 Ind. 397, 50 Am. Dec. 473; *Paddleford v. State*, 57 Miss. 118; *Craven v. Freeman*, 82 N. C. 361; *Keer v. Clark*, 11 Humph. (Tenn.) 77; *Liddell v. Wiswell*, 59 Vt. 365, 8 Atl. 680; *Smith v. Hodson*, 50 Wis. 279, 6 N. W. 812; *Clements v. Langley*, 2 Nev. & Man. 269. *Contra*, *TOBIAS v. ROGERS*, 13 N. Y. 59.

<sup>158</sup> *Preston v. Gould*, 64 Iowa, 44, 19 N. W. 834. See ante, § 159 (h), as to the claim of the surety against the principal becoming barred.

<sup>159</sup> *Cawthorne v. Welsinger*, 6 Ala. 714; *Williams v. Ewing*, 31 Ark. 229; *Buell v. Burlingame*, 11 Colo. 164, 17 Pac. 509; *Sexton v. Sexton*, 35 Ind. 88; *Crosby v. Wyatt*, 23 Me. 156; *Hooper v. Hooper*, 81 Md. 174, 31 Atl. 508, 48 Am. St. Rep. 496; *Crosby v. Wyatt*, 10 N. H. 318; *Leak v. Covington*, 99 N. C. 559, 6 S. E. 241; *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669; *Durbin v. Kuney*, 19 Or. 71, 23 Pac. 661; *Martin v. Frantz*, 127 Pa. 389, 18 Atl. 20, 14 Am. St. Rep. 859; *Faires v. Cockerell*, 88 Tex. 428, 31 S. W. 190, 28 L. R. A. 528; *Aldrich v. Aldrich*, 56 Vt. 324, 48 Am. Rep. 791; *WOLMERSHAUSEN v. GULLICK*, [1893] 2 Ch. 514. It is no defense to contribution that the claim was barred as to the principal, if it was enforceable as to the surety who paid it. *Evans v. Evans*, 16 Ala. 465.

not until that time that a right of action accrues.<sup>160</sup> If payment be in installments, the statute begins to run as to each from the date of each payment.<sup>161</sup> However, if the surety has paid part, not exceeding his proportionate part of the debt, and the principal afterwards pays the balance, the statute begins to run from the time of payment by the principal, as until that time, the surety not having paid in excess of his share, a right of action had not accrued in his favor; but the instant the principal paid it became evident for the first time that the surety had paid in excess of the amount equitably due from him, and his right of action arose.<sup>162</sup> The right of action, being founded upon an implied contract, is barred whenever any oral contract would be, and that portion of the statute relating to written contracts does not apply.<sup>163</sup>

*Set Off.*

If the surety seeking contribution owes the co-surety from whom contribution is sought, the latter, of course, can set off the debt against the plaintiff's claim;<sup>164</sup> or, if payment of the debt is sought, the co-surety entitled to contribution can set off his claim.<sup>165</sup>

**DEATH OR INSANITY OF CO-SURETY.**

**174. The right of contribution will not be lost by the death or subsequent insanity of a co-surety.**

Like any contract for the payment of money at a future time, the right of contribution will not be affected by the fact

<sup>160</sup> May v. Vann, 15 Fla. 553; Wood v. Leland, 1 Metc. (Mass.) 387; Singleton v. Townsend, 45 Mo. 379; Knotts v. Butler, 10 Rich. Eq. (S. C.) 143; Beck v. Tarrant, 61 Tex. 402.

<sup>161</sup> Preston v. Gould, 64 Iowa, 44, 19 N. W. 834; Bullock v. Campbell, 9 Gill (Md.) 182; Wood v. Leland, 1 Metc. (Mass.) 387; McClatchie v. Durham, 44 Mich. 435, 7 N. W. 76; Williamson's Adm'r v. Rees, 15 Ohio, 572; Bushnell v. Bushnell, 77 Wis. 435, 47 N. W. 442, 9 L. R. A. 411.

<sup>162</sup> DAVIES v. HUMPHREYS, 6 Mees. & W. 153.

<sup>163</sup> Bushnell v. Bushnell, 77 Wis. 435, 47 N. W. 442, 9 L. R. A. 411.

<sup>164</sup> Long v. Barnett, 38 N. C. 631.

<sup>165</sup> In re BAILY'S ESTATE, 156 Pa. 634, 27 Atl. 560, 22 L. R. A. 444.

that one of the co-sureties liable to contribution dies<sup>166</sup> or becomes insane<sup>167</sup> before or after a breach of his contract;<sup>168</sup> but such liability can be enforced against his estate, or, if the personal representative of the deceased co-surety pay the debt, he can enforce contribution from the living co-sureties.<sup>169</sup> The promise implied by law is that each co-surety individually will pay his proportionate share, and the rule of survivorship in the case of joint promisors does not apply.

If the deceased co-surety had bound himself and his "heirs," the latter would be liable to contribution if they had received anything from their ancestor.<sup>170</sup> Contribution made by the distributees of an estate should be in proportion to the amount each has received.<sup>171</sup>

#### SUBROGATION.

**175. Upon payment by one co-surety, he is entitled to subrogation to any security given to another co-surety by the principal, but not to any security given by a stranger.**

In a former chapter the right of subrogation as between the surety and the creditor was discussed.<sup>172</sup> It is the intention

<sup>166</sup> *Handley v. Heflin*, 84 Ala. 600, 4 South. 725; *Hecht v. Skaggs*, 53 Ark. 291, 13 S. W. 930, 22 Am. St. Rep. 192; *Conover v. Hill*, 76 Ill. 342; *SANDERS v. WEELBURG*, 107 Ind. 266, 7 N. E. 573; *Bachelder v. Flske*, 17 Mass. 464; *Stothoff v. Dunham*, 19 N. J. Law (4 Har.) 181; *Johnson v. Harvey*, 84 N. Y. 363, 38 Am. Rep. 515; *BRADLEY v. BURWELL*, 8 Denio (N. Y.) 61; *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669; *Malin v. Bull*, 13 Serg. & R. (Pa.) 441; *McKenna v. George*, 2 Rich. Eq. (S. C.) 15; *Reeves v. Pulliam*, 66 Tenn. (7 Baxt.) 119; *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. Dec. 98; *PACE v. PACE*, 95 Va. 792, 30 S. E. 361, 44 L. R. A. 459; *Lidderdale v. Robinson*, 12 Wheat. (U. S.) 594, 6 L. Ed. 740; *Beckett v. Addyman*, L. R. 9 Q. B. D. 783. Contra, *Waters' Representatives v. Riley*, 2 Har. & G. (Md.) 305, 18 Am. Dec. 302.

<sup>167</sup> *Pickering v. Leiberman* (D. C.) 41 Fed. 376.

<sup>168</sup> *Wyckoff v. Gardner* (N. J. Ch. 1886) 5 Atl. 801.

<sup>169</sup> *Dussol v. Brugliere*, 50 Cal. 456; *In re BAILY'S ESTATE*, 156 Pa. 634, 27 Atl. 560, 22 L. R. A. 444.

<sup>170</sup> *Gibson v. Mitchell*, 16 Fla. 519; *Stevens v. Tucker*, 73 Ind. 73.

<sup>171</sup> *Zollickoffer v. Seth*, 44 Md. 359.

<sup>172</sup> Ante, § 151.

here to treat of the right of co-sureties to security which has been given to one or more, but not to all, of them.

*Constructive Trust.*

Any security given by the principal to one co-surety inures to the benefit of all; and any co-surety making payment to the creditor, or by way of contribution, is entitled to subrogation thereto.<sup>173</sup> The co-surety receiving such security is regarded as a trustee for the others;<sup>174</sup> and it does not make any difference that such security was obtained by the exertion of the co-surety receiving it, or was intended for his sole benefit,<sup>175</sup> or that the surety was ignorant thereof at the time he entered into the relation.<sup>176</sup> One surety is not entitled to any advantage over his co-sureties, and it would be a fraud upon them if he were allowed to take the principal's property and lessen the latter's ability to meet his obligation.<sup>177</sup> However, if he has been put to any trouble and expense in obtaining security from the principal, the others, seeking subrogation, must reimburse him proportionately.<sup>178</sup>

<sup>173</sup> Bell v. Lamkin, 1 Stew. & P. (Ala.) 460; Flashback v. Weaver, 34 Ark. 569; Cannon v. Connaway, 5 Del. Ch. (Del.) 559; Silvey v. Dowell, 53 Ill. 260; Whiteman v. Harriman, 85 Ind. 49; Hoover v. Mowrer, 84 Iowa, 43, 50 N. W. 62, 35 Am. St. Rep. 293; Selbert v. Thompson, 8 Kan. 65; Morrison v. Poyntz, 37 Ky. (7 Dana) 307, 32 Am. Dec. 92; Smith v. Conrad, 15 La. Ann. 579; Scribner v. Adams, 73 Me. 541; Nally v. Long, 56 Md. 567; Low v. Smart, 5 N. H. 353; Leary v. Cheshire, 56 N. C. (3 Jones, Eq.) 170; Butler v. Birkey, 13 Ohio St. 514; Farmers' & Traders' Nat. Bank of La Grande v. Snodgrass, 29 Or. 395, 45 Pac. 758, 54 Am. St. Rep. 797; Shaeffer v. Clendenin, 100 Pa. 505; Agnew v. Bell, 4 Watts (Pa.) 31; Glasscock v. Hamilton, 62 Tex. 143; Flanagan v. Post, 45 Vt. 246; McMahon v. Fawcett, 2 Rand. (Va.) 514, 14 Am. Dec. 796; Lidderdale v. Robinson, 2 Brock. (U. S.) 159, Fed. Cas. No. 8,337; QUEEN v. DOUGHTY, Wight. 2, note (b); 40 Cent. Dig. col. 2314.

<sup>174</sup> Taylor v. Morrison, 26 Ala. 728, 62 Am. Dec. 747; PAULIN v. KAIGHN, 29 N. J. Law, 480; Hall v. Robinson, 30 N. C. 56; Carpenter v. Kelly, 9 Ohio, 106.

<sup>175</sup> Tyus v. De Jarnette, 26 Ala. 280; SANDERS v. WEELBURG, 107 Ind. 266, 7 N. E. 573; Reinhart v. Johnson, 62 Iowa, 155, 17 N. W. 452; McCune v. Belt, 45 Mo. 174; Fagan v. Jacocks, 15 N. C. 263; Miller v. Sawyer, 30 Vt. 412; STEEL v. DIXON, L. R. 17 Ch. Div. 825.

<sup>176</sup> STEEL v. DIXON, L. R. 17 Ch. Div. 825.

<sup>177</sup> Carpenter v. Kelly, 9 Ohio, 106.

<sup>178</sup> White v. Banks, 21 Ala. 705, 50 Am. Dec. 283.



Many maxims of the law conspire to justify the rule allowing subrogation: To avoid circuitry and multiplicity of actions; to prevent the exercise of one's right from interfering with the rights of others; to treat that as done which ought to be done; to require that the burden shall be borne by him for whose advantage it has been assumed; and to secure equality among those equally obliged and benefited.<sup>179</sup>

*Security for Several Debts.*

If the surety receiving security is liable, as such, upon different obligations of the principal, with different sets of sureties on each, the security will be apportioned among the different obligations,<sup>180</sup> unless the security was intended for a particular liability.<sup>181</sup>

*Indemnity Given after Adjustment of Rights.*

After all the respective rights and liabilities have been adjusted among co-sureties, they become individual creditors of the principal to the extent of the respective amounts paid by them, and any security received by one of them after that time will be an individual transaction between the principal and such surety, and the other sureties will not have any right to participate in such security.<sup>182</sup> The relation has ceased, and the theory of a constructive trust does not apply.

*Security Not Received from Principal.*

If the security given to one co-surety is received from a stranger, as the wife of the principal,<sup>183</sup> or from a co-surety,

<sup>179</sup> HAMPTON v. PHIPPS, 108 U. S. 260, 2 Sup. Ct. 622, 27 L. Ed. 719.

<sup>180</sup> Moore v. Moberly, 7 B. Mon. (Ky.) 299; Barge v. Van Der Horck, 57 Minn. 497, 59 N. E. 630; Brown v. Ray, 18 N. H. 102, 45 Am. Dec. 361; Sherman v. Foster, 158 N. Y. 587, 53 N. E. 504. In TITCOMB v. McALLISTER, 81 Me. 399, 17 Atl. 315, it is said that where a person is surety on two instruments, and holds security from the principal for both, he can apply the security to the one on which there are no co-sureties. Wilcox v. Fairhaven Bank, 7 Allen (Mass.) 270.

<sup>181</sup> McCune v. Belt, 45 Mo. 174; Lacy v. Rollins, 74 Tex. 506, 12 S. W. 314; Somers v. Johnson, 57 Vt. 274.

<sup>182</sup> Harrison v. Phillips, 46 Mo. 520; Hall v. Cushman, 16 N. H. 462, 43 Am. Dec. 562; Allen v. Wood, 38 N. C. 386; Urbahn v. Martin, 19 Tex. Civ. App. 93, 46 S. W. 291.

<sup>183</sup> Leggett v. McClelland, 39 Ohio St. 624.

the other co-sureties are not entitled to subrogation there-to; for a third person may have a personal reason for securing one of the co-sureties against loss, and there is no application of the theory of constructive fraud by taking the principal's property.

## CHAPTER VIII.

PARTIES TO NEGOTIABLE INSTRUMENTS OCCUPYING THE  
RELATION OF SURETIES.

- 176. Indorsers in General.
- 177. Drawer.
- 178-180. Irregular Indorsers.
- 181. Accommodation Parties.

## INDORSERS—IN GENERAL.

176. An indorser of a negotiable instrument, except an indorser without recourse, is a surety.

## DRAWER.

177. The drawer of a bill of exchange is the principal debtor before acceptance, but becomes a surety thereafter.

Having discussed the principles which apply to contracts of suretyship generally, it is now the purpose to consider certain particular contracts of suretyship, and treat of the rules which are peculiar to them.

*Indorsers—In General.*

The rights and liabilities of indorsers will be considered very briefly here, as this subject more properly belongs to a work on Negotiable Instruments.<sup>1</sup>

*Indorser—Definition.*

An indorser is one who writes his name on a negotiable instrument with intent to transfer title thereto, or to strengthen the security of the holder, or both; the indorsement properly, though not necessarily,<sup>2</sup> being placed upon the back. Indorsers are sureties in the broad sense of the word,<sup>3</sup> unless they expressly have indicated an intention to transfer title only, as is the case of an indorser without recourse.

<sup>1</sup> See Norton, Bills and Notes (3d Ed.) p. 105.

<sup>2</sup> Herring v. Woodhull, 29 Ill. 92, 81 Am. Dec. 296.

<sup>3</sup> See ante, c. I, note 5.



*Indorsements—Classification.*

Indorsements are subject to four classifications, as follows:

In Blank.

In Full, or Special.

General.

Qualified.

Without Recourse.

Restrictive.

Facultative.

Absolute.

Conditional.

Contingent.

Regular, or Ordinary.

Irregular, or Anomalous.

*Indorsements—Definitions.*

An indorsement in blank is one which does not specify an indorsee.<sup>4</sup>

An indorsement in full specifies an indorsee.<sup>5</sup>

A general indorsement is one in which the indorsee is entitled to the rights and subject to the duties implied by law only.

A qualified indorsement is one in which the indorser limits the rights of the indorsee or holder.

An indorsement without recourse is one in which the indorser exempts himself from liability to indemnify the holder upon dishonor of the instrument.<sup>6</sup>

A restrictive indorsement is one in which the indorser deputizes the indorsee to be his agent to collect the instrument, or else the indorsee is designated as a trustee for another.<sup>7</sup>

A facultative indorsement is one which enlarges the rights of the holder and the liabilities of the indorser,<sup>8</sup> as one which waives demand and notice.<sup>9</sup>

<sup>4</sup> Norton, Bills and Notes (3d Ed.) p. 110.

<sup>5</sup> Norton, Bills and Notes (3d Ed.) p. 116.

<sup>6</sup> Norton, Bills and Notes (3d Ed.) p. 119.

<sup>7</sup> Norton, Bills and Notes (3d Ed.) p. 119.

<sup>8</sup> Benj. Chal. Dig. art. 121.

<sup>9</sup> Emery v. Hobson, 62 Me. 578, 16 Am. Rep. 513.



An absolute indorsement is one to which no conditions are annexed, except such as may be implied by law.\*

A conditional indorsement is one which mentions conditions which must be performed before the indorsee acquires title, or upon the performance of which the indorsee's title is lost.

A contingent indorsement is one which makes the title of the indorsee dependent upon the happening or not happening of some designated event, or provides that the title of the indorsee shall be defeated upon the happening or not happening of some designated event.

A regular indorsement is one made by a former holder of the instrument entitled to receive payment, and whose name appears in a regular chain of title; the chief object of the indorsement being to transfer title.

An irregular indorsement is one made by a person whose name cannot be brought into any chain of title from the original holder down to the present holder; the chief object of the indorsement being security, and usually being placed upon the instrument before delivery to the payee.

Generally, an indorsement will be presumed to be regular, unless it clearly is not necessary to the chain of title, and its position is not in the regular chain of title, beginning with the payee, down through successive indorsees.<sup>10</sup>

Of these various kinds of indorsements, the only ones which are required to be noticed specially in connection with the subject of suretyship are the qualified, the regular, and the

\* Every indorsement, except a facultative one, where the conditions are waived, or in one without recourse, where notice would be useless, is a conditional contract; the conditions being that the holder at maturity will present the instrument to the maker or acceptor, demand payment, and give due notice of dishonor. Norton, Bills and Notes (3d Ed.) p. 373.

<sup>10</sup> A question as to liability might arise if there were several regular indorsements in blank, which were filled up by the holder so as to make one appear to be an irregular indorser, by leaving him out of the chain of title, as could be done by making the following indorser the indorsee in the indorsement preceding the name in question. If the instrument, in that condition, was transferred to a person for value without notice, the transferee might neglect to give the apparent irregular indorser notice of dishonor, regarding him as a guarantor not entitled to the same.

irregular indorsements. The suretyship element of the contract of an indorser is the same in all, except in the indorsement without recourse and in the irregular indorsement.

In an indorsement without recourse the indorser exempts himself from all liability if the party primarily liable thereon does not pay or accept it. This usually is done by writing over his signature<sup>11</sup> the words, "Without recourse," or words of a similar import.<sup>12</sup> He remains liable, however, on his implied warranties.<sup>13</sup>

*Implied Contract of Regular Indorser.*

Although a person may write and sign an express contract upon the back of a negotiable instrument, his contract usually is implied by law, and his rights and liabilities under such contract will depend upon the position of his signature and the time it is made.

The implied contract of a regular indorser in blank of a promissory note or of an accepted bill of exchange, if filled out, might read somewhat as follows: "For value received, I hereby transfer my legal title to this instrument and to the whole amount called for therein; and I promise to indemnify any subsequent holder<sup>14</sup> having title derived through me, if this instrument be presented to the maker (or to the acceptor) on the day of maturity, and due notice of its dishonor be given to me. I warrant that all prior signatures and that the instrument itself is genuine, and that the instrument is a valid and subsisting obligation; that all prior parties were competent, and are bound by their contracts; and that I have good title to the instrument, and a right to transfer it."<sup>15</sup>

The prevailing view is that this implied contract of a regular indorser cannot be varied or contradicted by oral evidence, it being regarded as definite as if expressed, though, of course, want of consideration, fraud, and such matters could be shown the same as in the case of a written contract.<sup>16</sup>

<sup>11</sup> *Doom v. Sherwin*, 20 Colo. 234, 38 Pac. 56.

<sup>12</sup> Norton, *Bills and Notes* (3d Ed.) p. 120.

<sup>13</sup> Norton, *Bills and Notes* (3d Ed.) p. 167.

<sup>14</sup> Norton, *Bills and Notes* (3d Ed.) p. 128.

<sup>15</sup> Norton, *Bills and Notes* (3d Ed.) p. 162.

<sup>16</sup> Norton, *Bills and Notes* (3d Ed.) p. 115.

The drawer and indorsers of a bill of exchange before acceptance undertake that there is a drawee at the place designated, capable of accepting, who will accept,<sup>17</sup> and promise to indemnify any subsequent holder, if the bill be presented for acceptance, and the drawee do not accept, and the necessary proceedings on dishonor be taken.<sup>18</sup> The promise of the drawer of a bill of exchange to indemnify subsequent holders after acceptance is similar to that of an indorser; that is, he stands in the position of a first indorser.<sup>19</sup>

This conditional promise to refund the consideration to immediate parties, or the face value to remote parties,<sup>20</sup> constitutes indorsers of all negotiable instruments and the drawer of an accepted bill of exchange sureties. The object of the indorser's contract is to give the holder three things—title, warranties, and security; and it is the latter element in the contract which makes him a surety.

*Drawer's Liability Changes at Acceptance.*

Prior to acceptance, the drawee of a bill of exchange is a stranger to it, and the drawer is the one primarily liable; but at the moment of acceptance the primary liability shifts to the acceptor,<sup>21</sup> as the presumption is that he owes the drawer—and that it is his own debt,<sup>22</sup> the drawer's liability thereafter being similar to that of a first indorser, as above stated.

**IRREGULAR INDORSER—PAYEE NAMED.**

**178. The presumption as to the liability of an irregular indorser, the payee being other than the maker or drawer of the instrument, is not the same in all jurisdictions.**

- (a) In some, he is presumed to be a joint promisor with the maker, and a surety.
- (b) In some, a guarantor.

<sup>17</sup> Norton, Bills and Notes (3d Ed.) p. 159.

<sup>18</sup> Norton, Bills and Notes (3d Ed.) p. 156.

<sup>19</sup> Norton, Bills and Notes (3d Ed.) p. 80.

<sup>20</sup> Norton, Bills and Notes (3d Ed.) p. 172.

<sup>21</sup> PHELPS v. BORLAND, 103 N. Y. 406, 9 N. E. 307, 57 Am. Rep. 755.

<sup>22</sup> JARVIS v. WILSON, 46 Conn. 90, 33 Am. Rep. 18.

- (c) In others, to have assumed the rights and liabilities of a regular indorser.
- (d) In Indiana, he has the rights and liabilities of a second indorser.
- (e) In West Virginia, he may be treated as the holder elects.
- (f) In New Jersey, no presumption exists.

#### **SAME—THIRD PERSON NOT NAMED AS PAYEE.**

179. One who places his name on the back of an instrument payable to the order of the maker or drawer, or payable to bearer, is deemed to be liable as a regular indorser to all parties subsequent to the maker or drawer.

#### **EXPRESS AGREEMENT.**

180. If the irregular indorser, by an express oral agreement, has assumed a liability different from that presumed by law, unless the presumption results from statute, such agreement can be shown, except as to parties without notice.

There is great diversity in the decisions of the various courts as to the liability which an irregular indorser is presumed to have intended to assume. The existence of the indorsement upon the instrument while in the hands of the payee, or its relative position as to other indorsements, indicates that it was not intended to transfer title; hence the presumption is that it was placed there for some other purpose, and the courts have reached different conclusions as to such presumed purpose, the irregular indorser having been held to be a joint maker, occupying the relation of a surety in the narrower sense,<sup>23</sup> a guarantor,<sup>24</sup> and a regular indorser.<sup>25</sup> In Indiana

<sup>23</sup> *Jones v. Bank of Pine Bluff* (Ark. 1906) 96 S. W. 1060; *Gilpin v. Marley*, 4 Houst. (Del.) 284; *Camp v. Simmons*, 62 Ga. 73; *O'Leary v. Martin*, 21 La. Ann. 389; *First Nat. Bank of Auburn v. Marshall*, 73 Me. 79; *Gumz v. Giegling*, 108 Mich. 295, 68 N. W. 48; *Herbage v. McEntee*, 40 Mich. 337, 29 Am. Rep. 536; *Schultz v. Howard*, 63 Minn. 196, 65 N. W. 363, 56 Am. St. Rep. 470; *Polking-*

<sup>24</sup> See note 24 on following page.

<sup>25</sup> See note 25 on following page.



he is presumed to be a second indorser;<sup>26</sup> in West Virginia the holder has his election as to the liability;<sup>27</sup> while in New

horne v. Hendricks, 61 Miss. 366; Schneider v. Schiffman, 20 Mo. 571; Salisbury v. First Nat. Bank, 37 Neb. 872, 56 N. W. 727, 40 Am. St. Rep. 527; Currier v. Fellows, 27 N. H. 366; McCelvey v. Noble, 12 Rich. Law (S. C.) 167; Sylvester v. Downer, 20 Vt. 355, 49 Am. Dec. 786; Good v. Martin, 95 U. S. 90, 24 L. Ed. 341; Paterson v. Pain, 1 Low. Can. 221.

<sup>24</sup> Conger v. Babbet, 67 Iowa, 13, 24 N. W. 569; Fullerton v. Hill, 48 Kan. 558, 29 Pac. 583, 18 L. R. A. 33; Arnold v. Bryant, 8 Bush (Ky.) 668; Van Doren v. Tjader, 1 Nev. 380, 90 Am. Dec. 498. In some states the irregular indorser is liable as a guarantor, if the indorsement was made after the delivery of the instrument, though it is otherwise if the indorsement was made before. Irish v. Cutter, 31 Me. 536; Tenney v. Prince, 4 Pick. (Mass.) 385, 16 Am. Dec. 347; Thompson & Thompson v. Brown (Mo. App. 1906) 97 S. W. 242; Castle v. Rickly, 44 Ohio St. 490, 9 N. E. 136, 58 Am. Rep. 839; Good v. Martin, 95 U. S. 90, 24 L. Ed. 341. In West Virginia the irregular indorser of a nonnegotiable instrument is prima facie a guarantor. KEARNES v. MONTGOMERY, 4 W. Va. 29.

<sup>25</sup> Alabama Nat. Bank v. Rivers, 116 Ala. 1, 22 South. 580, 67 Am. St. Rep. 95; Fessenden v. Summers, 62 Cal. 485. Colorado: Laws 1897, p. 223, c. 64, § 64. Connecticut: Laws 1897, p. 791, c. 74, § 64; Spencer v. Allerton, 60 Conn. 410, 22 Atl. 778, 13 L. R. A. 806. District of Columbia: Act Cong. Jan. 12, 1899, c. 47, § 64, 30 Stat. 791. Florida: Laws 1897, p. 36, c. 4524, § 64; Baumeister v. Kuntz (Fla. 1907) 42 South. 886. Illinois: Laws 1907, p. 411, § 64; Maryland: Laws 1898, p. 218, c. 119, § 83. Massachusetts: Rev. Laws, c. 73, § 80; Toole v. Crafts (Mass. 1906) 78 N. E. 775. New York: Laws 1897, p. 719, c. 612, amended Laws 1898, p. 973, c. 336; Phelps v. Vischer, 50 N. Y. 69, 10 Am. Rep. 433; Spies v. Gilmore, 1 N. Y. 322. North Carolina: Laws 1899, p. 935, c. 733, § 64. North Dakota: Laws 1899, p. 163, c. 113, § 64. Ohio: Rev. St. 1906, § 3173 (i). Oregon: Laws 1899, p. 27, § 64; Kamm v. Holland, 2 Or. 59. Pennsylvania: St. 1901, p. 203, § 64; Arnot's Adm'r v. Symonds, 85 Pa. 99, 27 Am. Rep. 630; Ellbert v. Finkbeiner, 68 Pa. 243, 8 Am. Rep. 176. Rhode Island: Laws 1899, p. 235, c. 674, § 72. Tennessee: Laws 1899, p. 152, c. 94, § 64. Utah: Laws 1899, p. 131, c. 83, § 64. Virginia: Laws 1897-98, p. 904, c. 866, § 64. Washington: Laws 1899, p. 352, c. 149, § 64. Wisconsin: Laws 1899, p. 711, c. 356, § 1677; Heath v. Van Cott, 9 Wis. 516. In some states the irregular indorser is liable as a regular indorser, if the indorsement was made after the delivery of the instrument, and as such is liable to subsequent parties. Cornett v. Hafer, 43 Kan. 60, 22 Pac. 1015; Culbertson v. Smith, 52 Md. 628, 36 Am. Rep. 384; Buck v. Hutchins, 45 Minn. 270, 47 N. W. 808.

<sup>26</sup> Moorman v. Wood, 117 Ind. 144, 19 N. E. 739.

<sup>27</sup> Golding Sons Co. v. Cameron Pottery Co. (W. Va. 1906) 55

Jersey no presumption will be indulged, but the exact liability assumed must be shown.<sup>20</sup>

*As a Joint Promisor.*

In many states the irregular indorser is regarded as a joint promisor, or a surety in the narrower sense. This excuses notice to him of nonpayment; but he is not a joint promisor in the sense that presentment and demand must be made as to him as maker in order to hold other parties who are entitled to notice of dishonor.<sup>21</sup>

*As a Guarantor.*

The reasoning in the states which hold that the irregular indorser is a guarantor is that he intended to assume some liability. He could not have intended to be a joint promisor with the maker, else he would have placed his name on the front of the instrument with the maker. He is not a regular indorser, as the position of the indorsement indicates that he did not intend to transfer title, which is the essential object of a regular indorsement. Hence his contract must be that of a guarantor of payment, there being nothing inconsistent with such a presumption. Where the irregular indorser is held to be liable as a joint maker, or as a guarantor, such liability can be enforced by the payee, as well as by subsequent holders.

*As an Indorser.*

In several states the liability of the irregular indorser has been fixed by statute, changing, in many instances, the liability as previously announced by the courts; so that in most jurisdictions, at the present time, the rights and liabilities of the irregular indorser are the same as those of a regular indorser, to the payee as well as to subsequent parties, if the indorsement was made before delivery to the payee.

If the irregular indorser were regarded as a second indorser, he could not be held liable by the payee, as the payee becomes the first indorser.

S. E. 396; *Burton v. Hansford*, 10 W. Va. 470, 27 Am. Rep. 571. If the instrument is nonnegotiable, the irregular indorser is *prima facie* a guarantor. *KEARNES v. MONTGOMERY*, 4 W. Va. 29.

<sup>20</sup> *Chaddock v. Vanness*, 35 N. J. Law, 517, 10 Am. Rep. 256.

<sup>21</sup> *Stearns*, Law of Suretyship, p. 208.

*Writing Out Implied Contract.*

The holder of an instrument, having the right to hold an irregular indorser thereon, is at liberty to write in full, over such indorser's signature, the contract presumed by law; and he may do so at any time.<sup>30</sup>

*Irregular Indorsements after Delivery.*

In some states the presumed liability of an irregular indorser varies with the time the indorsement was made, a distinction being made between an indorsement before and one made after delivery;<sup>31</sup> and, if the indorsement is not dated, as is usually the case, the presumption generally is that it was made before delivery;<sup>32</sup> but the actual time of indorsement may be shown.<sup>33</sup>

<sup>30</sup> *Andrews v. Simms*, 33 Ark. 771; *Worden v. Salter*, 90 Ill. 160; *Maxwell v. Vansant*, 46 Ill. 58; *Fear v. Dunlap*, 1 G. Greene (Iowa) 331; *Fuller v. Scott*, 8 Kan. 25; *Gist v. Drakely*, 2 Gill (Md.) 330, 41 Am. Dec. 426; *Scott v. Calkin*, 139 Mass. 529, 2 N. E. 675; *Josselyn v. Ames*, 3 Mass. 274; *Cromwell v. Hewitt*, 40 N. Y. 491, 100 Am. Dec. 527; *Griswold v. Slocum*, 10 Barb. (N. Y.) 402; *Leech v. Hill*, 4 Watts (Pa.) 448; *Horton v. Manning*, 37 Tex. 33; *Orrick v. Colston* 7 Grat. (Va.) 189; *Ford v. Mitchell*, 15 Wis. 308.

<sup>31</sup> In Maine and Missouri the irregular indorser is a joint maker before delivery, but a guarantor if the indorsement is made afterwards. *First Nat. Bank of Auburn v. Marshall*, 73 Me. 79; *Irish v. Cutter*, 31 Me. 536; *Schneider v. Schiffman*, 20 Mo. 571; *Burnham v. Gosnell*, 47 Mo. App. 637. In Minnesota he is a joint maker if the indorsement was made before delivery, but a regular indorser, liable to subsequent parties only, if made after delivery. *Peckham v. Gilman*, 7 Minn. 446 (Gill. 355); *Buck v. Hutchins*, 45 Minn. 270, 47 N. W. 808. In Kansas he is a guarantor if the indorsement is made before delivery, but a regular indorser, liable to subsequent parties only, if made afterwards. *Fullerton v. Hill*, 48 Kan. 558, 29 Pac. 583, 18 L. R. A. 33; *Cornett v. Hafer*, 43 Kan. 60, 22 Pac. 1015. In Maryland he has the rights and liabilities of a regular indorser, regardless of the time the indorsement is made; but he is liable to the

<sup>32</sup> *Gilpin v. Marley*, 4 Houst. (Del.) 284; *Boynton v. Pierce*, 79 Ill. 145; *Webster v. Cobb*, 17 Ill. 459; *Childs v. Wyman*, 44 Me. 433, 69 Am. Dec. 111; *National Pemberton Bank v. Lougee*, 108 Mass. 371, 11 Am. Rep. 367; *Martin v. Boyd*, 11 N. H. 385, 35 Am. Dec. 501; *Southerland v. Fremont*, 107 N. C. 565, 12 S. B. 237; *Cook v. Southwick*, 9 Tex. 615, 60 Am. Dec. 181. *Contra*, *Greenough v. Smead*, 3 Ohio St. 416.

<sup>33</sup> *Good v. Martin*, 95 U. S. 96, 24 L. Ed. 341.

*Instruments Payable to Maker's Order.*

Where a negotiable instrument is made payable to the order of the party who signs it, it cannot become of any legal effect until it bears the indorsement of the payee; hence the liability of a person who places his name on the back before delivery is presumed to be that of a second indorser,<sup>34</sup> if the name of the payee can be regarded as an indorsement,<sup>35</sup> and such irregular indorser cannot be held liable by the payee.

*Instruments Payable to Bearer.*

An indorsement placed upon an instrument originally payable to bearer will be presumed to be regular,<sup>36</sup> and that it

payee if the indorsement was made before delivery, whereas, if made after delivery, his liability extends to subsequent parties only. Laws 1898, p. 218, c. 119, § 83; Culbertson v. Smith, 52 Md. 628, 36 Am. Rep. 384. In Massachusetts and Ohio he has the rights and liabilities of a regular indorser if the indorsement was made before delivery but is regarded as a guarantor if the indorsement was made afterwards. Rev. Laws Mass. c. 73, § 80; Tenney v. Prince, 4 Pick. (Mass.) 385, 16 Am. Dec. 347; Rev. St. Ohio, 1906, § 3173 (1); Seymour v. Mickey, 15 Ohio St. 519.

<sup>34</sup> Colorado: Laws 1897, p. 223, c. 64, § 64. Connecticut: Laws 1897, p. 791, c. 74, § 64. District of Columbia: Act Cong. Jan. 12, 1899, c. 47, § 64, 30 Stat. 791. Florida: Laws 1897, p. 36, c. 4524, § 64. Illinois: Laws 1907, p. 411, § 64, par. 2; Chicago Trust & Savings Bank v. Nordgren, 157 Ill. 663, 42 N. E. 148; Blatchford v. Milliken, 35 Ill. 434. Maryland: Laws 1898, p. 218, c. 119, § 83. Massachusetts: Laws 1898, p. 502, c. 533, § 64; Dubois v. Mason, 127 Mass. 37, 34 Am. Rep. 335. Missouri: First Nat. Bank of St. Charles v. Payne, 111 Mo. 291, 20 S. W. 41, 33 Am. St. Rep. 520. New York: Laws 1897, p. 719, c. 612, amended Laws 1898, p. 973, c. 336. North Carolina: Laws 1899, p. 935, c. 733, § 64. North Dakota: Laws 1899, p. 163, c. 113, § 64. Oregon: Laws 1899, p. 27, § 64. Rhode Island: Laws 1899, p. 235, c. 674, § 72. Tennessee: Laws 1899, p. 152, c. 94, § 64. Utah: Laws 1899, p. 131, c. 83, § 64. Virginia: Laws 1897-98, p. 904, c. 866, § 64. Washington: Laws 1899, p. 352, c. 149, § 64. Wisconsin: Laws 1899, p. 711, c. 356, § 1677. The presumption, in this case, is conclusive. Hatley v. Pike, 162 Ill. 241, 44 N. E. 441, 53 Am. St. Rep. 304.

<sup>35</sup> The indorsement of the maker in such a case is not one technically, as he, being the maker, is not entitled to presentment, demand, and notice of default. Ewan v. Brooks-Waterfield Co., 55 Ohio St. 607, 45 N. E. 1094, 35 L. R. A. 786, 60 Am. St. Rep. 719.

<sup>36</sup> In Illinois an indorser before delivery of a note or unaccepted bill of exchange payable to bearer is liable as a regular indorser to all parties subsequent to the maker or drawer. Laws 1907, p. 411, § 64, par. 2.



was made by some holder after delivery, the same as an indorsement made after an instrument has become in effect payable to bearer by the indorsement of the payee or by some indorsee in blank.

*Express Agreement.*

If any express agreement was reached at the time the irregular indorsement was made, that agreement may be shown by oral evidence, if the question is raised in a suit between those who were parties to such agreement,<sup>87</sup> though the indorser cannot show that no liability was intended.<sup>88</sup>

### ACCOMMODATION PARTIES.

**181. Accommodation parties bear the relation of sureties to the parties accommodated.**

An accommodation party to a negotiable instrument is one who has become such, without recompense, for the purpose of lending his credit.<sup>89</sup> The person for whose particular advantage the credit is loaned is known as the accommodated party. The accommodation party, as well as the accommodated party, may occupy any position on the instrument, as maker, payee, drawer, acceptor, or indorser, the primary lia-

<sup>87</sup> *KINGSLAND v. KOEPPE*, 137 Ill. 344, 28 N. E. 48, 13 L. R. A. 649; *Smith v. Finch*, 2 Scam. (Ill.) 321; *Houck v. Graham*, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727; *Fullerton v. Hill*, 48 Kan. 558, 29 Pac. 583, 18 L. R. A. 33; *Levi v. Mendell*, 1 Duv. (Ky.) 77; *Dwight v. Linton*, 3 Rob. (La.) 57; *Sturtevant v. Randall*, 53 Me. 149; *Pierse v. Irvine*, 1 Minn. 369 (Gil. 272); *Jennings v. Thomas*, 21 Miss. 617; *Faulkner v. Faulkner*, 73 Mo. 327; *Chaddock v. Vanness*, 35 N. J. Law, 517, 10 Am. Rep. 256; *Chandler v. Westfall*, 30 Tex. 475; *Martin v. Marshall*, 60 Vt. 321, 13 Atl. 420; *Burton v. Hansford*, 10 W. Va. 470, 27 Am. Rep. 571; *Good v. Martin*, 95 U. S. 90, 24 L. Ed. 341. Where the liability is fixed by statute, a different one cannot be shown; nor can an express agreement, contrary to the implied one, be shown as to parties without notice. *Houston v. Bruner*, 30 Ind. 382; *Ives v. Bosley*, 35 Md. 262, 6 Am. Rep. 411; *Draper v. Weld*, 13 Gray (Mass.) 580; *Schneider v. Schiffman*, 20 Mo. 571; *Whitehouse v. Hanson*, 42 N. H. 18.

<sup>88</sup> *Geneser v. Wissner*, 69 Iowa, 119, 28 N. W. 471; *Gumz v. Gierling*, 108 Mich. 295, 66 N. W. 48.

<sup>89</sup> *Norton*, Bills and Notes (3d Ed.) p. 176.

bility depending upon the one receiving the benefit; and as to other parties, even as to other accommodation parties,<sup>40</sup> they will be liable in the capacity which they have assumed impliedly or expressly,<sup>41</sup> although the exact relation is known.<sup>42</sup> But the accommodation party never can be held liable by the accommodated party; for the latter is, as to the former, always the principal,<sup>43</sup> and the principal never can recover from his surety. Thus, if a promissory note, in regular form, is indorsed and discounted by the payee named therein, for his sole benefit, the maker having signed the note to lend the payee credit, and not having received any part of the proceeds thereof, the maker could be held liable by all subsequent holders exactly the same as if he had received the proceeds of the note himself and had issued it for his own benefit. He has assumed this liability, and it can be enforced by one knowing all the facts; but, as between the accommodation party and the accommodated party, the primary duty is upon the latter to pay

<sup>40</sup> Norton, Bills and Notes (3d Ed.) p. 135.

<sup>41</sup> CASEY v. BRABASON, 10 Abb. Prac. (N. Y.) 368; Chester v. Dorr, 41 N. Y. 279. An accommodation indorser would be discharged if not given notice of nonpayment. Braley v. Buchanan, 21 Kan. 274.

<sup>42</sup> In FENTUM v. POCOCK, 5 Taunt. 192, it was held that the holder of a bill of exchange could give time to the drawer without discharging the acceptor, although the holder might have knowledge that the acceptor was an accommodation party and the drawer the real principal.

<sup>43</sup> Lacy v. Lofton, 26 Ind. 324; Corlies v. Howe, 11 Gray (Mass.) 125, 71 Am. Dec. 693; Messmore v. Meyer, 56 N. J. Law, 31, 27 Atl. 938; Baker v. Martin, 3 Barb. (N. Y.) 634; Burdsall v. Chrisfield, 1 Disn. (Ohio) 51; American Nat Bank v. Junk Bros., 94 Tenn. (10 Pickle) 624, 30 S. W. 753, 28 L. R. A. 492; Thompson v. Clubley, 8 M. & W. 212. In the following states, by statute, the accommodated payee cannot hold an accommodation indorser: Colorado: Laws 1897, p. 223, c. 64, § 64. Connecticut: Laws 1897, p. 791, c. 74, § 64. District of Columbia: Act Cong. Jan. 12, 1899, c. 47, § 64, 30 Stat. 791. Florida: Laws 1897, p. 36, c. 4524, § 64. Illinois: Laws 1907, p. 411, § 64, par. 3. Maryland: Laws 1898, p. 218, c. 119, § 83. Massachusetts: Laws 1898, p. 502, c. 533, § 64. New York: Laws 1897, p. 719, c. 612, amended Laws 1898, p. 973, c. 336. North Carolina: Laws 1899, p. 935, c. 733, § 64. North Dakota: Laws 1899, p. 163, c. 113, § 64. Oregon: Laws 1899, p. 27, § 64. Rhode Island: Laws 1899, p. 235, c. 674, § 72. Tennessee: Laws 1899, p. 152, c. 94, § 64. Utah: Laws 1899,

the note or bill,<sup>44</sup> and, if he does pay it, he cannot recover from the maker, while the maker, upon payment, could sue the payee.<sup>45</sup>

p. 131, c. 83, § 64. Virginia: Laws 1897-98, p. 904, c. 866, § 64. Washington: Laws 1899, p. 352, c. 149, § 64. Wisconsin: Laws 1899, p. 711, c. 356, § 1677.

<sup>44</sup> *Messmore v. Meyer*, 56 N. J. Law, 31, 27 Atl. 938; *Grocers' Bank of New York v. Penfield*, 69 N. Y. 502, 25 Am. Rep. 231; *American Nat. Bank v. Junk Bros.*, 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492.

<sup>45</sup> The acceptor can recover from the drawer—the former being the accommodation party, and the latter the accommodated party—on a bill of exchange. *HOWES v. MARTIN*, 1 Esp. 162.

## CHAPTER IX.

## OFFICIAL BONDS.

- 182. Wrongful Acts of Public Officers.
- 183-184. Errors by Public Officers.
- 185. Contracts Made by Public Officers as Agents.
- 186. Private Transactions of Public Officers.
- 187. Deputies.
- 188. Loss of Funds.

## WRONGFUL ACTS OF PUBLIC OFFICERS.

182. Sureties on the bond of a public officer, are liable for his acts committed—
- (a) By an improper exercise of his apparent authority.
  - (b) By an exercise of authority which he pretends to have, but apparently does not have.

*Official Bonds—Definition.*

An official bond is one given by an officer; but there are different meanings attached to the word "officer," as used in this definition. Officers are public or private. In some cases, "official bond" means the bond of a public officer only; in other cases, it means the bond of an officer, strictly such, whether public or private; while, in still other cases, the word "officer" is given a very comprehensive meaning, including employés, agents, contractors, etc. The context, however, always indicates the sense in which it is used. This chapter will be devoted chiefly to public officers, as the general principles applicable to official bonds have been considered in former chapters.

*Public Officers.*

An officer of the government is a public officer,<sup>1</sup> though a person may be rendering service for the public according to

<sup>1</sup> A notary public is a public officer. *People v. Rathbone*, 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384. So is an attorney at law. In *re Cooper*, 22 N. Y. 67; *Waters v. Whittemore*, 22 Barb. (N. Y.) 593; *Thomas v. Steele*, 22 Wis. 207; *White's Case*, 6 Mod. 18.

the requirements of law, and yet not be a public officer, as he may be under contract.<sup>2</sup> There is no contract entered into between the people and the officer who serves them; hence the bond of a public officer is not subject to the same construction that would apply to the bond of a private officer. A public officer, upon election or appointment, takes the oath of office and enters upon the duties which the common law or statute has annexed to his office.<sup>3</sup>

*Bonds of Public Officers.*

There is no common-law requirement that a public officer shall give a bond,<sup>4</sup> though such bonds, if given, are enforced. The giving of bonds by public officers usually is regulated by statute, which frequently prescribes the form; and as there are so many various public officers, and the liabilities of their sureties depend upon the statute and the wording of the bonds, it is not within the scope of this work to treat of each office in detail.

Sometimes the statute states that an office shall become vacant if the incumbent fail to file his bond within a prescribed time;<sup>5</sup> but it is held that, unless the statute plainly provides that a failure to file a bond works a forfeiture of the office, it is sufficient if a bond be filed before steps are taken to declare the office vacant.<sup>6</sup>

*Acts Colore Officii and Acts Virtute Officii.*

Sometimes a distinction has been made by the courts between acts of an officer done under color of his office (*colore officii*) and those done by virtue of his office (*virtute officii*),

<sup>2</sup> Stearns, *Law of Suretyship*, p. 278.

<sup>3</sup> *Trainor v. Board of Auditors*, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95. If the officer acts, his sureties are bound, although he did not take the oath. *Town of Lyndon v. Miller*, 36 Vt. 329.

<sup>4</sup> Stearns, *Law of Suretyship*, p. 281.

<sup>5</sup> *State ex rel. Harris v. Tucker*, 54 Ala. 205; *People v. Perkins*, 85 Cal. 509, 26 Pac. 245; *In re Attorney General*, 14 Fla. 277; *State ex rel. Lemonnier v. Beard*, 34 La. Ann. 273; *State v. Lansing*, 48 Neb. 514, 64 N. W. 1104, 35 L. R. A. 124; *State v. Ruff*, 4 Wash. 234, 29 Pac. 999, 16 L. R. A. 140.

<sup>6</sup> *Cawley v. People*, 95 Ill. 249; *Schuff v. Pfanz*, 99 Ky. 97, 35 S. W. 132.

holding that his sureties were liable for the latter only;<sup>7</sup> but the preponderance of authority is that sureties are liable for acts in each case.<sup>8</sup> Thus, if a sheriff, not having any legal authority, as sheriff, to collect taxes, were to assert that his office gave him that right and proceed to collect taxes, he would be acting under color of his office; whereas, if he have the legal right, as sheriff, to levy an execution, but makes the levy improperly, he is acting by virtue of his office. In the first case he does an act which, under no circumstances, is connected with his office, but which he assumes to belong to his office; in the second case he performs an act which pertains to his office, but he performs this particular act improperly. In the first case he assumes authority for the performance of acts of a different nature from those annexed to the office which he holds; in the second case he abuses the authority which his office gives him. The sureties on the bond of the executive officer of a court, such as a sheriff, constable,<sup>9</sup> marshal,<sup>10</sup> or the coroner,<sup>11</sup> acting in the place of the sheriff, would be liable if the officer were to levy upon exempt property,<sup>12</sup> or upon the property of a third person who is a stranger to the writ.<sup>13</sup>

<sup>7</sup> *State v. Conover*, 28 N. J. Law, 224, 78 Am. Dec. 54; *Gerber v. Ackley*, 37 Wis. 43, 19 Am. Rep. 751.

<sup>8</sup> *Clancy v. Kenworthy*, 74 Iowa, 740, 35 N. W. 427, 7 Am. St. Rep. 508; *Jewell v. Mills*, 3 Bush (Ky.) 62; *Drolesbaugh v. Hill*, 64 Ohio St. 257, 60 N. E. 202; *Lucas v. Locke*, 11 W. Va. 81.

<sup>9</sup> *Inhabitants of Greenfield v. Wilson*, 13 Gray (Mass.) 384; *State, to Use of Garrett, v. Farmer*, 21 Mo. 160; *Brunott v. McKee*, 6 Watts & S. (Pa.) 513.

<sup>10</sup> *Lammon v. Feusler*, 111 U. S. 17, 4 Sup. Ct. 286, 28 L. Ed. 337.

<sup>11</sup> *Tleman v. Haw*, 49 Iowa, 312.

<sup>12</sup> *Casper v. People*, 6 Ill. App. (6 Bradw.) 28; *Strunk v. Ocheltree*, 11 Iowa, 158; *Hursey v. Marty*, 61 Minn. 430, 63 N. W. 1090; *Hobbs v. Barefoot*, 104 N. C. 224, 10 S. E. 170; *Cole v. Crawford*, 69 Tex. 124, 5 S. W. 646.

<sup>13</sup> *Van Pelt v. Littler*, 14 Cal. 194; *Town of Norwalk v. Ireland*, 68 Conn. 1, 35 Atl. 804; *United States v. Hine*, 3 McArthur (D. C.) 27; *Wickler v. People*, 68 Ill. App. 282; *Horan v. People*, 10 Ill. App. 21; *Charles v. Haskins*, 11 Iowa, 329, 77 Am. Dec. 148; *Commonwealth ex rel. Davy v. Stockton*, 5 T. B. Mon. (Ky.) 192; *Archer v. Noble*, 3 Me. 418; *Tracy v. Goodwin*, 5 Allen (Mass.) 409; *People v. Mersereau*, 74 Mich. 687, 42 N. W. 153; *Hursey v. Marty*, 61 Minn. 430, 63 N. W. 1090; *State, to Use of Gates, v. Fitzpatrick*, 64 Mo.

**ERRORS OF EXECUTIVE OFFICERS.**

183. Sureties on the bond of a public officer are liable for defaults arising from his want of care or lack of judgment.

**ERRORS OF JUDICIAL OFFICERS.**

184. Sureties on the bond of a judicial officer are not liable for his errors in judgment committed in a matter within his jurisdiction; but they are liable for his defaults in regard to ministerial acts.

*Executive Officers.*

The liability of sureties is not affected by the intention with which the officer acts;<sup>14</sup> they being liable for his mistakes, although he thought he was doing his duty. When a person accepts a public office, he holds himself out as being capable of properly performing the duties annexed to it, and his sureties are liable for his defaults, whether arising from lack of care or from lack of judgment<sup>15</sup>—whether arising from a failure to perform a duty,<sup>16</sup> or from the performance of an unlawful act willfully<sup>17</sup> or a lawful act improperly.<sup>18</sup>

185; *Turner v. Killian*, 12 Neb. 580, 12 N. W. 101; *Cumming v. Brown*, 43 N. Y. 514; *People v. Schuyler*, 4 N. Y. 173; *State v. Jennings*, 4 Ohio St. 418; *Carmack v. Commonwealth*, 5 Bin. (Pa.) 184; *Holliman v. Carroll*, 27 Tex. 23, 84 Am. Dec. 606; *Sangster v. Commonwealth*, 17 Grat. (Va.) 124; *Marquis v. Willard*, 12 Wash. 528, 41 Pac. 889, 50 Am. St. Rep. 906.

<sup>14</sup> *Heidt v. Minor*, 89 Cal. 115, 26 Pac. 627; *United States v. Hine*, 3 McArthur (D. C.) 27; *Jewell v. Mills*, 3 Bush (Ky.) 62; *Weintz v. Kramer*, 44 La. Ann. 35, 10 South. 416; *Turner v. Killian*, 12 Neb. 580, 12 N. W. 101; *State, to Use of Story, v. Jennings*, 4 Ohio St. 419; *Holliman v. Carroll*, 27 Tex. 23, 84 Am. Dec. 606; *Sangster v. Commonwealth*, 17 Grat. (Va.) 124.

<sup>15</sup> *Stearns, Law of Suretyship*, p. 304.

<sup>16</sup> *Governor v. Pleasants*, 4 Pike (Ark.) 193; *People v. Smith*, 123 Cal. 70, 55 Pac. 765; *Palmer v. Pettingill*, 6 Idaho, 348, 55 Pac. 653; *Governor v. Dodd*, 81 Ill. 162; *Babka v. People*, 73 Ill. App.

<sup>17</sup> See note 17 on following page.

<sup>18</sup> See note 18 on following page.



*Judicial Officers.*

Sureties on the bond of a judicial officer, such as a judge or justice of the peace, are liable for his ministerial acts only.<sup>19</sup> A ministerial act is one which it is the duty of a person to perform in a manner prescribed by authority, without regard to his judgment as to its propriety. Thus, it is the duty of a justice of the peace to issue execution when required by law, and he is not allowed to use his discretion as to its propriety. Should he fail to issue the execution, his sureties would be liable.<sup>20</sup> However, if he has jurisdiction of a case, and he renders a judgment therein, his sureties cannot be held liable, however erroneous his decision is.<sup>21</sup>

While the sureties for a judge are not liable for his judicial acts which are properly within his discretion, they would be liable for an exercise of judicial powers in matters which

246; *Waymire v. State*, 80 Ind. 67; *Morgan v. Long*, 29 Iowa, 434; *COMMONWEALTH v. STRATON*, 7 J. J. Marsh. (Ky.) 90; *Anderson v. Jollett*, 14 La. Ann. 624; *Rosenthal v. Davenport*, 38 Minn. 543, 38 N. W. 618; *Brown v. Lester*, 13 Smedes & M. (Miss.) 392; *Alexander v. Eberhardt*, 35 Mo. 475; *Maddox v. Rader*, 9 Mont. 126, 22 Pac. 386; *McNee v. Sewell*, 14 Neb. 532, 16 N. W. 827; *Sloan v. Case*, 10 Wend. (N. Y.) 370, 25 Am. Dec. 569; *Carpenter v. Doody*, 1 Hillt. (N. Y.) 465; *Badham v. Jones*, 64 N. C. 655; *Habersham v. Sears*, 11 Or. 431, 5 Pac. 208, 50 Am. Rep. 481; *Shannon v. Commonwealth*, 8 Serg. & R. (Pa.) 444; *Strain v. Babb*, 30 S. C. 342, 9 S. E. 271, 14 Am. St. Rep. 905; *O'Bannon v. Saunders*, 24 Grat. (Va.) 138; *Commonwealth v. Fry*, 4 W. Va. 721. Sickness is not an excuse for failure to perform a duty. *Freudenstein v. McNeir*, 81 Ill. 208.

<sup>17</sup> *Scotten v. Fegan*, 62 Iowa, 236, 17 N. W. 491; *Rochereau v. Jones*, 29 La. Ann. 82.

<sup>18</sup> *Spain v. Clements*, 63 Ga. 786; *Billings v. Lafferty*, 81 Ill. 318; *Field & Co. v. Wallace*, 89 Iowa, 597, 57 N. W. 303; *Lescouzeve v. Ducatel*, 18 La. Ann. 470; *Carter v. Duggan*, 144 Mass. 32, 10 N. E. 486; *People ex rel. Curtiss v. Colby*, 39 Mich. 456; *Barnard v. Schuler* (Minn.) 110 N. W. 966; *Brock v. Hopkins*, 5 Neb. 231; *Topping v. Windley*, 99 N. C. 4, 5 S. E. 14; *Van Etten v. Commonwealth*, 102 Pa. 596.

<sup>19</sup> *McLendon v. Mortgage Co.*, 119 Ala. 518, 24 South. 721; *Brockett v. Martin*, 11 Kan. 378; *Larson v. Kelly*, 64 Minn. 51, 66 N. W. 130; *Head v. Levy*, 52 Neb. 456, 72 N. W. 583; *Place v. Taylor*, 22 Ohio St. 817.

<sup>20</sup> *Stearns, Law of Suretyship*, p. 832.

<sup>21</sup> *McGrew v. Governor*, 19 Ala. 89.



are not within his jurisdiction, as such acts are void, and, if damage results, he becomes a trespasser.<sup>22</sup>

Generally, the sureties on the bond of a judicial officer are not liable if, originally having jurisdiction of a case, he later acts in excess thereof. Thus, if a judge, in a criminal case properly before him, should impose a sentence greater than the law authorized, he would not be liable,<sup>23</sup> though he might act maliciously;<sup>24</sup> nor, of course, would his sureties be liable.

#### OFFICER AS AGENT OF THE PUBLIC.

**185. Sureties for a public officer are not liable for his contracts made as agent of the state or municipality which he represents.**

#### OFFICER'S PRIVATE TRANSACTIONS.

**186. Sureties for a public officer are not liable for his defaults in transactions with him as an individual, although the transaction was entered into to assist him in the performance of his official duties.**

#### *Officer as Public Agent.*

The sureties of a public officer undertake to be responsible for acts in an official capacity only. It frequently happens that he acts as agent of the public in making contracts for the performance of some service, such as the printing of notices. When he thus acts, he does not incur a personal liability, any more than any agent does.<sup>25</sup> If he acts within the scope of his authority, he binds his principal only.<sup>26</sup>

<sup>22</sup> *Bigelow v. Stearns*, 19 Johns. (N. Y.) 39, 10 Am. Dec. 189; *Woodward v. Paine*, 15 Johns. (N. Y.) 493; *Truesdell v. Combs*, 33 Ohio St. 186; *Miller v. Grice*, 2 Rich. Law (S. C.) 27, 44 Am. Dec. 271.

<sup>23</sup> *Doepfner v. State*, 36 Ind. 111; *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80.

<sup>24</sup> *Bradley v. Fisher*, 13 Wall. (U. S.) 335, 20 L. Ed. 646.

<sup>25</sup> *Stearns, Law of Suretyship*, p. 309.

<sup>26</sup> *Tiffany, Agency*, p. 330.

*Private Transactions by Officers.*

A person, by becoming a public officer, does not lose his power to act as a private individual, and his sureties cannot be held liable for his contracts entered into as a private citizen, although he may have entered into the contract with special reference to his official duties. Thus, if a sheriff should hire a conveyance to enable him to perform his official duties, this would be a private contract, and his sureties would not be liable for his failure to pay. Persons contracting with an officer under such circumstances must look to him individually, and not to him in his official capacity.<sup>27</sup>

**DEPUTIES.**

**187. The sureties on the bond of a public officer must answer for the defaults of his deputy, committed in his official capacity.**

If the law authorizes a public officer to appoint deputies, his sureties will be liable for the defaults of such deputies; for a deputy is one who acts for another, and the act of the deputy is the act of the officer,<sup>28</sup> provided the act is one which the law requires him to perform in his official capacity, and the sureties are liable, though there is no express condition in the bond to that effect.

An assistant, clerk, or employé is not a deputy, and does not perform official acts, although coming within the broad meaning sometimes given to the word "officer."<sup>29</sup>

<sup>27</sup> *Brown v. Phipps*, 14 Miss. (6 Smedes & M.) 51; *Commonwealth v. Swope*, 45 Pa. 535, 84 Am. Dec. 518; *Allen v. Ramey*, 4 Strob. (S. C.) 30.

<sup>28</sup> *Thomas v. Kinkadee*, 55 Ark. 503, 18 S. W. 854, 15 L. R. A. 558, 29 Am. St. Rep. 68; *Crawford v. Howard*, 9 Ga. 314; *Cash v. People*, 32 Ill. App. 250; *Yount v. Carney*, 91 Iowa, 559, 60 N. W. 114; *Johnson v. Williams*, 111 Ky. 289, 63 S. W. 759, 54 L. R. A. 220, 98 Am. St. Rep. 416; *Brown v. Weaver*, 76 Miss. 7, 23 South. 388, 42 L. R. A. 423, 71 Am. St. Rep. 512; *Todd v. Jackson*, 3 Humph. (Tenn.) 398; *Verratt v. McAulay*, 50 Ont. 313.

<sup>29</sup> *United States v. Hartwell*, 6 Wall. (U. S.) 385, 18 L. Ed. 830.

**LOSS OF FUNDS.**

**188. Sureties on the bond of a public officer having the custody of funds are liable for a loss thereof resulting without his fault or negligence; but sureties on the bond of a private officer would not be liable under such circumstances.**

Where an officer has the custody of funds, and a loss results without any fault or negligence on his part, a distinction is made between public and private officers; the sureties on the bond of the former being held liable,<sup>80</sup> though it is otherwise as to the sureties for a private officer.<sup>81</sup>

The reason for the distinction seems to be based upon the ground of public policy.<sup>82</sup> In the case of a loss of funds by a private officer, there is always some one who is interested enough to investigate, and any fraud would be discovered; but, in the case of a public officer, it would afford too much opportunity for collusion,<sup>83</sup> and the protection of the public requires the adoption of a strict and rigid rule, to be applied in all cases, whether the loss is without the fault or negligence of the officer or not.

The sureties on the bond of a public officer are liable in every instance for losses arising from fire,<sup>84</sup> theft,<sup>85</sup> robbery,

<sup>80</sup> *Ramsey v. People*, 97 Ill. App. 283; *Halbert v. State*, 22 Ind. 125; *Taylor Dist. Tp. v. Morton*, 37 Iowa, 550; *State ex rel. Township v. Powell*, 67 Mo. 395, 29 Am. Rep. 512; *State ex rel. Board of Com'rs of Bladen County v. Clarke*, 73 N. C. 255; *Boyden v. United States*, 13 Wall. (U. S.) 17, 20 L. Ed. 527.

<sup>81</sup> *Planters' & Merchants' Bank of Huntsville v. Hill*, 1 Stew. (Ala.) 201, 18 Am. Dec. 39; *Chicago, B. & Q. R. R. Co. v. Bartlett*, 120 Ill. 603, 11 N. E. 867; *Id.*, 20 Ill. App. 96; *People v. Faulkner*, 107 N. Y. 477, 14 N. E. 415; *Baltimore & O. R. Co. v. Jackson (Pa.)* 3 Atl. 100.

<sup>82</sup> *Thompson v. Board of Trustees*, 80 Ill. 99.

<sup>83</sup> *United States v. Prescott*, 8 How. (U. S.) 578, 11 L. Ed. 734.

<sup>84</sup> *Union Dist. Tp. v. Smith*, 39 Iowa, 9, 18 Am. Rep. 39.

<sup>85</sup> *Morbeck v. State*, 28 Ind. 86; *State v. Lanier*, 31 La. Ann. 423; *Inhabitants of Hancock v. Hazzard*, 12 Cush. (Mass.) 112, 59 Am. Dec. 171; *Redwood County v. Tower*, 28 Minn. 45, 8 N. W. 907; *Muzzy v. Shattuck*, 1 Denio (N. Y.) 233; *State, to Use of Wyandot County, v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 363; *Commonwealth*

or burglary, or from the failure of a bank in which the funds were deposited.<sup>86</sup> It does not make any difference that the officer had every reason to believe that the bank was solvent,<sup>87</sup> and that he did not have any safe place in which to keep the funds;<sup>88</sup> and, in the case of a loss arising from burglary, it is not a defense that the officer was furnished with a safe and a building, which he was required to use.<sup>89</sup>

v. Comly, 3 Pa. 372; *United States v. Morgan*, 11 How. (U. S.) 154, 13 L. Ed. 643.

<sup>86</sup> *Thomssen v. Hall County*, 63 Neb. 777, 89 N. W. 389, 57 L. R. A. 303.

<sup>87</sup> *Inglis v. State*, 61 Ind. 212; *Rose v. Douglass Tp.*, 52 Kan. 451, 34 Pac. 1046, 39 Am. St. Rep. 354; *Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637; *Board of Education of Village of Pine Island v. Jewell*, 44 Minn. 427, 46 N. W. 914, 20 Am. St. Rep. 586; *Griffin v. Levee Com'rs*, 71 Miss. 767, 15 South. 107; *State ex rel. Mississippi County v. Moore*, 74 Mo. 413, 41 Am. Rep. 322; *State v. Hill*, 47 Neb. 456, 66 N. W. 541; *State v. Nevin*, 19 Nev. 162, 7 Pac. 650, 3 Am. St. Rep. 873; *Tillinghast v. Merrill*, 151 N. Y. 135, 45 N. E. 375, 34 L. R. A. 678, 56 Am. St. Rep. 612; *Havens v. Lathene*, 75 N. C. 505; *Nason v. Poor Directors*, 126 Pa. 445, 17 Atl. 616; *Wilson v. Wichita County*, 67 Tex. 647, 4 S. W. 67; *Fairchild v. Hedges*, 14 Wash. 117, 44 Pac. 125, 31 L. R. A. 851; *Supervisors of Omro v. Kalme*, 39 Wis. 468.

<sup>88</sup> *Lowry v. Polk County*, 51 Iowa, 50, 49 N. W. 1049, 33 Am. Rep. 114.

<sup>89</sup> *United States v. Fordyce* (D. C.) 122 Fed. 962.

## CHAPTER X.

## JUDICIAL BONDS.

- 189. Executors' and Administrators' Bonds.
- 190. Guardians' Bonds.
- 191. Appeal Bonds.
- 192. Attachment Bonds.
- 193. Injunction Bonds.
- 194. Replevin Bonds.

## BONDS OF PERSONAL REPRESENTATIVES.

189. Sureties on the bond of an executor or of an administrator are liable for the funds of the estate to creditors, legatees, distributees, and other interested persons; but they cannot be held for an unliquidated claim.

*Judicial Bonds—Definition.*

A judicial bond or undertaking is one given in the course of legal proceedings. In some respects, personal representatives and guardians resemble public officers; but, as they perform their duties under the supervision of a court, it seems more proper to treat their bonds as judicial, rather than as official, ones.<sup>1</sup>

Only a few of the more important judicial bonds will be considered, and very briefly; an extensive treatment thereof being beyond the scope of this work.

*Defaults as to Payment by Personal Representatives.*

If the amount payable by an administrator or executor is definite and payable by a certain time, the sureties on his bond are liable if he fail to make payment, although there has not been any order of court directing payment;<sup>2</sup> but if the claim is disputed, or the amount unascertained, the sureties

<sup>1</sup> Stearns, Law of Suretyship, p. 415.

<sup>2</sup> Gould v. Steyer, 75 Ind. 50. As to the liability of sureties on bonds of executors and administrators, see 22 Cent. Dig. col. 3340.

cannot be held liable until there has been a specific order of court directing payment.

As the subsequent income from real estate which the decedent owned at the time of his death belongs to the heirs, the sureties of an administrator are not liable therefor, though collected by him;<sup>5</sup> nor are sureties liable for the expenses of administration,<sup>6</sup> the principal being personally liable therefor.

*Defaults Through Negligence or Error.*

If funds are lost through the negligence or bad judgment of an administrator, his sureties are liable;<sup>5</sup> and, if he be a debtor to the estate, his sureties will be liable for the amount of his debt,<sup>6</sup> unless he be insolvent.<sup>7</sup> Likewise, the sureties are liable upon his failure to pay claims which have been allowed, or which, under a statute, it is his duty to pay.<sup>8</sup>

<sup>5</sup> *People v. Huffman*, 182 Ill. 390, 55 N. E. 961; *Reversing* 78 Ill. App. 345; *Young v. People*, 35 Ill. App. 363; *State v. Barrett*, 121 Ind. 92, 22 N. E. 969; *Smith v. Bland*, 46 Ky. 21; *Robinson v. Millard*, 133 Mass. 236; *Douglass v. Mayor*, 56 How. Prac. (N. Y.) 178; *Commonwealth v. Gibson*, 8 Watts (Pa.) 214; *Reed v. Commonwealth*, 11 Serg. & R. (Pa.) 441; *Hutcherson v. Pigg*, 8 Grat. (Va.) 220.

<sup>6</sup> *Taylor v. Mygatt*, 26 Conn. 184.

<sup>7</sup> *Lee v. Lee*, 67 Ala. 406; *Butler v. Sisson*, 49 Conn. 580; *Johnston v. Maples*, 49 Ill. 101; *Richardson v. Boynton*, 12 Allen (Mass.) 138, 90 Am. Dec. 141; *Judge of Probate v. Mathes*, 60 N. H. 433; *Baer's Appeal*, 127 Pa. 360, 18 Atl. 1, 4 L. R. A. 609; *Murray v. Luna*, 86 Tenn. (2 Pickle) 326, 6 S. W. 603; *Lyon v. Osgood*, 58 Vt. 707, 7 Atl. 5; *Lacy v. Stamper*, 27 Grat. (Va.) 42. Mismanagement and waste of an estate is called a *devastavit*. It may be willful, as in the case of an improper release of claims due the estate, or a conversion of the assets; it may be by doing a proper act improperly, as paying claims before they are due; or it may be by neglect, as a failure to collect claims, or to protect perishable property.

<sup>8</sup> *Wright v. Lang*, 66 Ala. 389; *Kirby v. Moore* (Ky.) 99 S. W. 1156; *Kealhofer v. Emmert*, 79 Md. 248, 29 Atl. 63; *Winship v. Bass*, 12 Mass. 199; *Judge of Probate v. Sulloway*, 68 N. H. 511, 44 Atl. 720, 49 L. R. A. 347, 73 Am. St. Rep. 619; *In re Consalus*, 95 N. Y. 340; *Soverhill v. Suydam*, 59 N. Y. 140; *McGaughey v. Jacoby*, 54 Ohio St. 487, 44 N. E. 231; *Piper's Estate*, 15 Pa. 533; *Twitty v. Houser*, 7 S. C. 153.

<sup>7</sup> *State v. Gregory*, 119 Ind. 503, 22 N. E. 1; *Harker v. Irick*, 10 N. J. Eq. 269; *Baucus v. Barr*, 45 Hun (N. Y.) 582, affirmed 107 N. Y. 624, 13 N. E. 939; *Spurlock v. Earles*, 67 Tenn. 437; *Lyon v. Osgood*, 58 Vt. 707, 7 Atl. 5.

<sup>8</sup> *Commonwealth v. Longenecker*, 1 Ches. Co. Rep. (Pa.) 202.

*Suit on Bond.*

An action on the bond \* can be brought by creditors, distributees, legatees, or other interested persons,<sup>10</sup> a judgment against the principal by a court of competent jurisdiction being conclusive against as well as in favor of his sureties, unless it has been obtained by fraud; and it is not any defense to the sureties that a decree or judgment was entered upon a settlement of the principal's accounts without notice to them.<sup>11</sup>

**BONDS OF GUARDIANS.**

**190. The sureties on the bond of a guardian are liable for all funds of the ward received by the guardian prior to the maturity of the ward.**

The liability of the sureties on the bond of a guardian<sup>12</sup> resembles, in many respects, that of sureties on the bond of an administrator. They are liable for all of the property of the ward in the possession of the guardian, regardless of the source from which he received it;<sup>13</sup> for property received before the bond was given;<sup>14</sup> for the indebtedness of the

\* A prior administrator and his successor cannot be joined as defendants. *Governor, to Use of Evans, v. Hays*, 3 Mo. 434. It is not a good defense that the principal was advised in good faith by his attorney to do the wrongful act. *Bourne v. Stevenson*, 58 Me. 499.

<sup>10</sup> *State v. Scott*, 12 Ind. 529; *Rawson v. Piper*, 34 Me. 98; *Goodkin v. Holt*, 3 N. H. 392; *Boyle v. St. John*, 28 Hun (N. Y.) 454.

<sup>11</sup> *Martin v. Tally*, 72 Ala. 23; *George v. Elms*, 46 Ark. 260; *Irwin v. Backus*, 25 Cal. 214, 85 Am. Dec. 125; *Nevitt v. Woodburn*, 160 Ill. 203, 43 N. E. 385, 52 Am. St. Rep. 315; *McDonald v. People*, 222 Ill. 325, 78 N. E. 609; *Clark v. Fredenburg*, 43 Mich. 263, 5 N. W. 306; *State v. Crensbauer*, 68 Mo. 254; *Ordinary v. Kershaw*, 14 N. J. Eq. 527; *DEOBOLD v. OPPERMANN*, 111 N. Y. 531, 19 N. E. 94, 2 L. R. A. 644, 7 Am. St. Rep. 760; *Kelly v. West*, 80 N. Y. 139; *Slagle v. Entrekin*, 44 Ohio St. 637, 10 N. E. 678; *Stovall v. Banks*, 10 Wall. (U. S.) 583, 19 L. Ed. 1036.

<sup>12</sup> As to the liability of sureties on the bond of a guardian, see 25 Cent. Dig. col. 810.

<sup>13</sup> *Alston v. Alston*, 34 Ala. 15; *Warwick v. State*, 5 Ind. 350; *Carr v. Askew*, 94 N. C. 194; *Gray v. Brown*, 1 Rich. Law (S. C.) 351.

<sup>14</sup> *Merrells v. Phelps*, 34 Conn. 109; *Fogarty v. Ream*, 100 Ill. 366;

guardian to the ward;<sup>15</sup> for property received from another state;<sup>16</sup> and for property which the guardian might have secured by ordinary diligence.<sup>17</sup>

They are liable, likewise, for losses resulting from lack of care in making investments;<sup>18</sup> but they are not liable for money received by the guardian after the ward attains his majority,<sup>19</sup> though, as to property received prior thereto, their liability continues until the guardian has made a proper settlement with the ward.<sup>20</sup>

#### APPEAL BONDS.

**191. If, upon appeal, a judgment be affirmed, the sureties on the appeal bond become liable therefor.**

Before the party against whom a judgment has been entered in a lower court can have the law and the facts or the law alone reviewed in a higher court, or have the case retried there,<sup>21</sup> he must give a bond to protect the successful party against any injury which the latter may sustain by reason of the delay forced upon him in satisfying his judgment. This bond is

*Bockenstedt v. Perkins*, 73 Iowa, 23, 34 N. W. 488, 5 Am. St. Rep. 652; *State v. Bilby*, 50 Mo. App. 162.

<sup>15</sup> *Johnson v. Hicks*, 97 Ky. 116, 30 S. W. 3; *Mattoon v. Cowing*, 79 Mass. (13 Gray) 387; *State v. Hull*, 53 Miss. 626; *O'Neill v. Herbert*, Dud. Eq. (S. C.) 30; *Sargent v. Wallis*, 67 Tex. 483, 3 S. W. 721. Sureties are not liable for work performed for the guardian by the ward, as the ward is not entitled to his wages. *Phillips v. Davis*, 34 Tenn. (2 Sneed) 520, 62 Am. Dec. 472.

<sup>16</sup> *McDonald v. Meadows*, 58 Ky. (1 Metc.) 507; *State v. Hull*, 53 Miss. 626; *Pearson v. Dalley*, 75 Tenn. (7 Lea) 674.

<sup>17</sup> *McKim v. Morse*, 130 Mass. 439; *Ames v. Williams*, 74 Miss. 404, 20 South. 877.

<sup>18</sup> *Lee v. Lee*, 67 Ala. 406; *Richardson v. Boynton*, 12 Allen (Mass.) 138, 90 Am. Dec. 141.

<sup>19</sup> *Chapin v. Livermore*, 13 Gray (Mass.) 561; *Commonwealth v. Pray*, 125 Pa. 542, 17 Atl. 450; *Shelton v. Smith*, 62 Tenn. 82.

<sup>20</sup> *Gillett v. Wiley*, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587; *Carter v. Tice*, 120 Ill. 277, 11 N. E. 529; *Parr v. State*, 71 Md. 220, 17 Atl. 1020; *Douglass v. Ferris*, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435; *Newton v. Hammond*, 38 Ohio St. 430.

<sup>21</sup> See *Stearns, Law of Suretyship*, p. 352, note 9, as to the distinction between an appeal and a writ of error.



known as an "appeal bond," and, after reciting the action of the lower court, contains a provision to pay the amount of the judgment, if affirmed in the upper court.<sup>22</sup>

If the party appealing fails to perfect his appeal, or it is dismissed for lack of prosecution, the sureties are liable,<sup>23</sup> unless the failure has not arisen through the fault of the appellant, as would be the case if he were enjoined from prosecuting the appeal.<sup>24</sup>

An affirmance as to one or more of the parties, but not as to all, makes the sureties liable;<sup>25</sup> and, if the bond is conditioned to pay "whatever judgment may be rendered" in the appellate court, the sureties will be liable for a less or a greater amount than the judgment appealed from.<sup>26</sup> If the unsuc-

<sup>22</sup> As to the liability of sureties on appeal bonds, see 3 Cent. Dig. col. 2843.

<sup>23</sup> Chase v. Beraud, 29 Cal. 138; Long v. Sullivan, 21 Colo. 109, 40 Pac. 359; Sutherland v. Phelps, 22 Ill. 92; Coon v. McCormack, 69 Iowa, 539, 29 N. W. 455; Simonds v. Helnn, 22 La. Ann. 296; Commonwealth v. Green, 138 Mass. 200; Flannagan v. Cleveland, 44 Neb. 58, 62 N. W. 297; Teel v. Tice, 14 N. J. Law, 444; Blair v. Sanborn, 82 Tex. 686, 18 S. W. 159. It is otherwise where the appellant dies, and the appellee does not prosecute the suit. Nelson v. Anderson, 2 Call (Va.) 286.

<sup>24</sup> Planters' & Miners' Bank v. Hudgins, 84 Ga. 108, 10 S. E. 501.

<sup>25</sup> Porter v. Singleton, 28 Ark. 483; Wood v. Orford, 56 Cal. 157; Lewis v. Maulden, 93 Ga. 758, 21 S. E. 147; Ives v. Hulce, 17 Ill. App. 35; Lutt v. Sterrett, 26 Kan. 561; Gilpin v. Hord, 85 Ky. 213, 3 S. W. 143; Hood v. Mathis, 21 Mo. 308; Johnson v. Reed, 47 Neb. 322, 66 N. W. 405; Goodwin v. Bunzl, 102 N. Y. 224, 6 N. E. 399; Seacord v. Morgan, \*42 N. Y. 636; Brown v. Conner, 32 N. C. 75; Alber v. Froelich, 39 Ohio St. 245, overruling Lang v. Pike, 27 Ohio St. 498; McFarlane v. Howell, 91 Tex. 218, 42 S. W. 853; Vandyke v. Weil, 18 Wis. 277. See, also, Cook v. Ligon, 54 Miss. 625.

<sup>26</sup> Harding v. Kuessner, 172 Ill. 125, 49 N. E. 1001; Cooper v. Rhodes, 30 La. Ann. 533; Masser v. Strickland, 17 Serg. & R. (Pa.) 354, 17 Am. Dec. 663; Hare v. Marsh, 61 Wis. 435, 21 N. W. 267, 50 Am. Rep. 141; Hopkins v. Orr, 124 U. S. 510, 8 Sup. Ct. 590, 31 L. Ed. 523. If the surety undertakes to pay any judgment rendered against the principal, he is liable, although another party is added in the appellate court and judgment is rendered against both. Helt v. Whittier, 31 Ohio St. 475. If the bond names a definite amount, an increase of the claim will discharge the sureties, if they have not consented thereto. Willis v. Crooker, 1 Pick. (Mass.) 204; Sage v. Strong, 40 Wis. 575.

cessful party on appeal carries the case to a still higher court, the sureties on all prior appeal bonds remain liable to the appellee<sup>27</sup> and to all prior parties who have not participated in the appeal.<sup>28</sup>

While the bond will be invalid if it be materially defective,<sup>29</sup> unimportant defects will not be considered.<sup>30</sup>

#### ATTACHMENT BONDS.

**192. The sureties on an attachment bond are liable for all direct damage suffered by the defendant if the writ was issued improperly.**

##### *Attachment of Statutory Origin.*

As the plaintiff, at common law, was required to await the recovery of a judgment before he could interfere with the property of the defendant, this left him practically remediless if the defendant were out of the jurisdiction, or if the defendant, upon learning that a suit had been started against him, concealed his property, or if he became insolvent pending the action. To remedy this defect statutes have been enacted allowing the plaintiff, in certain cases, to have the property of the defendant seized at the time the suit is instituted and held to await the outcome of the suit. In order to prevent

<sup>27</sup> Shannon v. Dodge, 18 Colo. 164, 32 Pac. 61; Becker v. People, 164 Ill. 267, 45 N. E. 500; Coonradt v. Campbell, 29 Kan. 391; Boaz v. Milliken, 4 Ky. Law Rep. 700; Jordan v. Wollen Co., 106 Mass. 571; CHESTER v. BRODERICK, 131 N. Y. 549, 30 N. E. 507; Church v. Simmons, 83 N. Y. 261; Dolby v. Jones, 13 N. C. 109; Moore v. Lassiter, 16 Lea (Tenn.) 630; Babbitt v. Finn, 101 U. S. 7, 25 L. Ed. 820. While a surety is discharged on reversal of the judgment appealed from, his liability revives if the reversal be set aside on further appeal. Robinson v. Plimpton, 25 N. Y. 484; Smith v. Crouse, 24 Barb. (N. Y.) 433. See, also, Pearl v. Wellman, 11 Ill. 352. Contra, Nofsinger v. Hartnett, 84 Mo. 549.

<sup>28</sup> Ante, c. V, note 639.

<sup>29</sup> Block v. Blum, 33 Ill. App. 643; Tucker v. State, 11 Md. 322; Waller v. Pittman, 1 N. C. 324.

<sup>30</sup> Railsback v. Greve, 58 Ind. 72; Handy v. Land Co., 59 Kan. 395, 53 Pac. 67; Pray v. Wasdell, 146 Mass. 324, 16 N. E. 266; Wile v. Koch, 54 Ohio St. 608, 44 N. E. 236; In re Gleeson's Estate, 192 Pa. 279, 43 Atl. 1032, 73 Am. St. Rep. 808.

injury to the defendant, the plaintiff is required to give a bond before the defendant's property can be taken; the condition of the bond being, generally, to pay the defendant such damages as he may have sustained by reason of the attachment if wrongful.<sup>81</sup> As attachment is purely statutory, the provisions in attachment bonds vary in the different states.<sup>82</sup> Sureties on an attachment bond are liable, although not given until after the attachment is levied;<sup>83</sup> and defects in form,<sup>84</sup> or irregularities in execution,<sup>85</sup> will not release them.

*Forthcoming Bonds and Bonds to Dissolve Attachment.*

After the attachment has been made, the defendant, desiring to recover possession of his property, can obtain a release thereof by giving what is designated as a "forthcoming bond," conditioned for the return of the property if the suit be decided against him, or by giving a bond to discharge the attachment, conditioned for the payment of the plaintiff's judgment, if any be obtained. In some states, the defendant's forthcoming bond is conditioned for the return of the property or the payment of its value. The sureties on a forthcoming bond will not be liable if the attachment is discharged,<sup>86</sup> and, if the plaintiff obtain a judgment, they will be released by a tender of the identical property taken;<sup>87</sup> but it is not sufficient to tell where the property is, with instructions to go and take it.<sup>88</sup>

*Wrongful Attachment.*

If the attachment be wrongful, the sureties are liable, although the plaintiff may have acted in good faith.<sup>89</sup> The at-

<sup>81</sup> Hopewell v. McGrew, 50 Neb. 789, 70 N. W. 397. And see, further, in regard to attachment, Stearns, Law of Suretyship, p. 390.

<sup>82</sup> As to the liability, generally, of sureties on attachment bonds, see 5 Cent. Dig. col. 1211.

<sup>83</sup> Sumpter v. Willson, 1 Ind. 144.

<sup>84</sup> Ripley v. Gear, 58 Iowa, 460, 12 N. W. 480; Hibbs v. Blair, 14 Pa. 413.

<sup>85</sup> Gibbs v. Johnson, 63 Mich. 671, 30 N. W. 343; Ward v. Whitney, 8 N. Y. 442.

<sup>86</sup> Hamilton v. Bell, 123 Cal. 93, 55 Pac. 758; Gass v. Williams, 46 Ind. 253; Alexander v. Jacoby, 23 Ohio St. 358; Fernau v. Butcher, 113 Pa. 292, 6 Atl. 67.

<sup>87</sup> Pogue v. Joyner, 7 Ark. 462; Jones v. Jones, 38 Mo. 429.

<sup>88</sup> Chapline v. Robertson, 44 Ark. 202. The officer, however, may waive delivery. Hansford v. Perrin, 6 B. Mon. (Ky.) 595.

<sup>89</sup> Pollock v. Gantt, 69 Ala. 373, 44 Am. Rep. 519; Elder v. Kutner,

tachment may be wrongful, although the plaintiff's claim is a valid one, as there may not be any justifiable reason for seizing the defendant's property before judgment has been recovered.<sup>40</sup>

*Damages.*

The damages allowed the defendant will be such as are the direct result of the wrongful attachment. Speculative damage,<sup>41</sup> such as loss resulting from his absence from business,<sup>42</sup> will be excluded. Recovery may be had for loss resulting from an injury to the property,<sup>43</sup> or from being deprived of its use,<sup>44</sup> and for reasonable expenses to which the defendant has been put in securing a dissolution of the attachment, such as attorney fees,<sup>45</sup> traveling expenses, hotel bills,<sup>46</sup> and the value of his time<sup>47</sup> while attending the hearing.

97 Cal. 490, 32 Pac. 563; *Churchill v. Abraham*, 22 Ill. 456; *McDaniel v. Gardner*, 84 La. Ann. 341; *Carothers v. McIlhenny Co.*, 63 Tex. 138. Contra, *Charles City Plow & Mfg. Co. v. Jones*, 71 Iowa, 234, 32 N. W. 280.

<sup>40</sup> *Kerr v. Reece*, 27 Kan. 469; *Tynberg v. Cohen*, 76 Tex. 409, 13 S. W. 315; *Offterdinger v. Ford*, 92 Va. 636, 24 S. E. 246.

<sup>41</sup> *Goodbar v. Lindsley*, 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54; *Oberne v. Gaylord*, 13 Ill. App. 30; *Campbell v. Chamberlain*, 10 Iowa, 337; *Pettit v. Mercer*, 8 B. Mon. (Ky.) 51; *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156.

<sup>42</sup> *Higgins v. Mansfield*, 62 Ala. 267.

<sup>43</sup> *Frankel v. Stern*, 44 Cal. 168; *Hoge v. Norton*, 22 Kan. 374.

<sup>44</sup> *Boatwright v. Stewart*, 37 Ark. 614; *Hurd v. Barnhart*, 53 Cal. 97; *Green Fruit Co. v. Pate & Co.*, 99 Ga. 60, 24 S. E. 455; *State v. McKeon*, 25 Mo. App. 667.

<sup>45</sup> *Green Fruit Co. v. Pate & Co.*, 99 Ga. 60, 24 S. E. 455; *Damron v. Sweetser*, 16 Ill. App. 339; *Trapnall v. McAfee*, 60 Ky. 34, 77 Am. Dec. 152; *Adams v. Gomila*, 37 La. Ann. 479; *Swift v. Plessner*, 39 Mich. 178; *State v. Gage*, 52 Mo. App. 464; *Raymond Bros. v. Green*, 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763; *Northrup v. Garrett*, 17 Hun (N. Y.) 497.

<sup>46</sup> *Damron v. Sweetser*, 16 Ill. App. 339; *State v. Shobe*, 23 Mo. App. 474.

<sup>47</sup> *Higgins v. Mansfield*, 62 Ala. 267; *Sanford v. Willetts*, 29 Kan. 647.

**INJUNCTION BONDS.**

193. When it is determined finally that an injunction ought not to have been granted, the sureties upon the injunction bond are liable for damages resulting directly from the issuance of the injunction.

Before a court will issue a writ of injunction requiring a person to do or to abstain from doing some act, the party desiring the writ must give a bond, with sureties, to indemnify the defendant for any loss which may be sustained by him if it be found that the injunction has been granted improperly.<sup>48</sup>

*Damages.*

Until it has been determined finally that an injunction should not have been granted, the sureties are not liable in damages.<sup>49</sup> Recovery cannot be had for indirect damage;<sup>50</sup> nor will the defendant be allowed damages for mental strain and anxiety.<sup>51</sup> If the defendant deny that he had any intention of doing the act prohibited by the injunction, he has not suffered any injury, and is not entitled to any damages.<sup>52</sup> Thus, where the defendant was enjoined from negotiating a note, and he answered that he did not intend to do so, the sureties upon the injunction bond were not liable.<sup>53</sup> The defendant is not entitled to compensation for loss of time in procuring a dissolution of an injunction;<sup>54</sup> but he is entitled to his necessary expenses to that end.<sup>55</sup> Thus, he can recover for attorney

<sup>48</sup> As to the liability, in general, of sureties on injunction bonds, see 27 Cent. Dig. col. 2279.

<sup>49</sup> *Dorriss v. Carter*, 67 Mo. 544; *Krug v. Bishop*, 44 Ohio St. 221, 6 N. E. 252; *Pickett v. Boyd*, 11 Lea (Tenn.) 498.

<sup>50</sup> *Chicago City Ry. Co. v. Howison*, 86 Ill. 215; *Hilbard v. McKindley*, 28 Ill. 240; *Epenbaugh v. Gooch*, 15 Ky. Law Rep. 576; *Hotchkiss v. Platt*, 8 Hun (N. Y.) 46; *Wood v. Hollander*, 84 Tex. 394, 19 S. W. 551; *Lehman v. McQuown* (C. C.) 31 Fed. 138.

<sup>51</sup> *Cook v. Chapman*, 41 N. J. Eq. 152, 2 Atl. 286.

<sup>52</sup> *Hayes v. Gravel Co.*, 37 Ill. App. 19.

<sup>53</sup> *Bank of Monroe v. Gifford*, 70 Iowa, 580, 31 N. W. 881.

<sup>54</sup> *Cook v. Chapman*, 41 N. J. Eq. 152, 2 Atl. 286.

<sup>55</sup> *Alliance Trust Co. v. Stewart*, 115 Mo. 236, 21 S. W. 793; *Ten Eyck v. Sayer*, 76 Hun, 87, 27 N. Y. Supp. 588; *Crounse v. Railroad Co.*, 32 Hun (N. Y.) 497.

fees expended in procuring its dissolution,<sup>56</sup> unless the injunction was but a part of the relief asked by the plaintiff, and is dissolved after a hearing of the entire case,<sup>57</sup> without any particular services having been rendered in relation to the injunction; but attorney fees paid in resisting its allowance cannot be recovered, as the latter expense was incurred before the injunction was issued, and was not the result of it,<sup>58</sup> the liability of the sureties extending to such damages as arise after the injunction has been issued. If the defendant had been successful in resisting the injunction, there would not have been an injunction bond, yet the expense would have been incurred just the same. Likewise, there cannot be any recovery for attorney fees paid in securing a modification of the injunction.<sup>59</sup>

#### REPLEVIN BONDS.

**194. The sureties on a replevin bond will be liable if the plaintiff in the replevin suit do not prosecute his action with diligence; or if the plaintiff do not restore the property to the defendant, or pay its value in event its seizure was wrongful; or if the defendant suffer damage by reason of its wrongful seizure and detention.**

<sup>56</sup> *Bush v. Kirkbride*, 131 Ala. 405, 30 South. 780; *Bustamente v. Stewart*, 55 Cal. 115; *Belmont Mining & Milling Co. v. Costigan*, 21 Colo. 465, 42 Pac. 650; *Wittich v. O'Neal*, 22 Fla. 592; *Binford v. Grimes*, 26 Ind. App. 481, 59 N. E. 1085; *Colby v. Meservey*, 85 Iowa, 555, 52 N. W. 499; *Nimmocks v. Welles*, 42 Kan. 39, 21 Pac. 787; *New National Turnpike Co. v. Dulaney*, 86 Ky. 516, 6 S. W. 590; *Meaux v. Pittman*, 35 La. Ann. 360; *Neiser v. Thomas*, 46 Mo. App. 47; *City of Helena v. Brule*, 15 Mont. 429, 39 Pac. 456, 852; *Cook v. Chapman*, 41 N. J. Eq. 152, 2 Atl. 286; *Crounse v. Railroad Co.*, 32 Hun (N. Y.) 497; *Noble v. Arnold*, 23 Ohio St. 264.

<sup>57</sup> *Bolling v. Tate*, 65 Ala. 417, 30 Am. Rep. 5; *San Diego Water Co. v. Steamship Co.*, 101 Cal. 216, 35 Pac. 651; *Tabor v. Clark*, 15 Colo. 434, 25 Pac. 181; *Ady v. Freeman*, 90 Iowa, 402, 57 N. W. 879; *Lamb v. Shaw*, 43 Minn. 507, 45 N. W. 1134; *Brown v. Baldwin*, 121 Mo. 126, 25 S. W. 863; *Whiteside v. Cottage Ass'n*, 84 Hun, 555, 32 N. Y. Supp. 724; *Noble v. Arnold*, 23 Ohio St. 264; *Livingston v. Exum*, 19 S. C. 223; *Donahue v. Johnson*, 9 Wash. 187, 37 Pac. 322.

<sup>58</sup> *Randall v. Carpenter*, 88 N. Y. 293.

<sup>59</sup> *Ford v. Loomis*, 62 Iowa, 586, 16 N. W. 193, 17 N. W. 910.

The action of replevin is brought to recover the possession of specific personal property by one claiming a right thereto, and its object is forcibly to take such property from the person having possession.<sup>60</sup> Before the plaintiff will be permitted to maintain the action, he must give a bond<sup>61</sup> to indemnify the defendant for any damage which the latter may sustain if the seizure be wrongful,<sup>62</sup> and conditioned to prosecute the suit with diligence,<sup>63</sup> and to return the property to the defendant if the plaintiff fail to establish a right to its possession, or to pay its value.<sup>64</sup> There is a breach of the bond if the plaintiff voluntarily discontinue his suit at any time before final judgment.<sup>65</sup> The officer serving the writ is liable if he do not require a bond, and may refuse to act until a sufficient bond has been tendered.<sup>66</sup>

In the absence of fraud, a judgment against the plaintiff dismissing the action, or finding that the property belongs to the defendant, is conclusive evidence against the sureties on the bond;<sup>67</sup> and the costs of the suit may be included in the

<sup>60</sup> See Stearns, *Law of Suretyship*, p. 407.

<sup>61</sup> As to the liability, generally, of sureties on replevin bonds, see 24 Cent. Dig. col. 2486.

<sup>62</sup> *Mason v. Richards*, 12 Iowa, 73.

<sup>63</sup> *Mills v. Gleason*, 21 Cal. 274; *Humphrey v. Taggart*, 38 Ill. 228; *Elliott v. Black*, 45 Mo. 372; *Alderman v. Roesel*, 52 S. C. 162, 29 S. E. 385.

<sup>64</sup> The amount stated in the bond is prima facie evidence of the value of the property. *Martin v. Hertz*, 224 Ill. 84, 79 N. E. 558.

<sup>65</sup> *Wiseman v. Lynn*, 39 Ind. 250; *McKey v. Lauffin*, 48 Kan. 581, 30 Pac. 16. If the failure to prosecute results from causes not within the plaintiff's control, there is no breach of the bond. *Burkle v. Luce*, 1 N. Y. 163; *Pierce v. Hardee*, 1 Thomp. & C. (N. Y.) 557.

<sup>66</sup> *Hall v. Monroe*, 73 Me. 123; *Bulmer v. Jenkins*, 3 How. Prac. (N. Y.) 11; *Hughes v. Newsom*, 86 N. C. 424.

<sup>67</sup> *Ernst v. Hogue*, 86 Ala. 502, 5 South. 738; *Cantril v. Babcock*, 11 Colo. 143, 17 Pac. 296; *Schott v. Youree*, 142 Ill. 233, 31 N. E. 591; *Peck v. Wilson*, 22 Ill. 205; *McFadden v. Fritz*, 110 Ind. 1, 10 N. E. 120; *Mason v. Richards*, 12 Iowa, 73; *Jacobson v. Metzgar*, 43 Mich. 403, 5 N. W. 445; *McKinney v. Willis*, 64 Miss. 82, 1 South. 3; *Thomas v. Markmann*, 43 Neb. 823, 62 N. W. 206; *Richardson v. Bank*, 57 Ohio St. 299, 48 N. E. 1100; *Cox v. Hartranft*, 154 Pa. 457, 26 Atl. 304; *Barry v. Frayser*, 10 Heisk. (Tenn.) 206; *Washington Ice Co. v. Webster*, 125 U. S. 426, 8 Sup. Ct. 947, 31 L. Ed. 799. See also, *Kennedy v. Brown*, 21 Kan. 171.

damages recovered by the defendant.<sup>68</sup> If the replevin suit failed for some reason which did not involve the merits of the controversy,<sup>69</sup> as would be the case where the action was dismissed for lack of jurisdiction,<sup>70</sup> the sureties can show, in mitigation of damages, that the plaintiff had a right to the property, though this will not release the sureties from all liability,<sup>71</sup> and they may be held for nominal damages at least.

<sup>68</sup> *Morrill v. Daniel*, 47 Ark. 316, 1 S. W. 702; *Harts v. Wendell*, 28 Ill. App. 274.

<sup>69</sup> *Davis v. Harding*, 3 Allen (Mass.) 302.

<sup>70</sup> *Robinson v. Teeter*, 10 Ind. App. 698, 38 N. E. 222.

<sup>71</sup> In Illinois, the statutes (Rev. St. c. 119, § 26) provide that the sureties may show that the plaintiff has a right to the property, if the merits of the case are not determined in the replevin suit. *O'Donnell v. Colby*, 153 Ill. 324, 38 N. E. 1065; *Hertz v. Kaufman*, 46 Ill. App. 591.



## CHAPTER XI.

## BAIL BONDS AND RECOGNIZANCES.

- 195-196. Definitions.
- 197. Rights and Liabilities in General.
- 198-200. Custody and Surrender of Principal.
- 201. Discharge of Bail—In General.
- 202. Discharge by Performance.
- 203. Discharge by New Bond or Recognizance.
- 204-205. Discharge by Act of God or by Act of Law.
- 206. Forfeiture.

## BAIL BOND—DEFINITION.

195. A bail bond is one taken by a sheriff, conditioned for the due appearance of a defendant named therein to answer to legal process described, by which process the sheriff is commanded to arrest the defendant, and by authority of such process has arrested him.

## RECOGNIZANCE—DEFINITION.

196. A recognizance is an obligation of record, entered into before some court, conditioned for the performance of some particular act specified therein.

When a person has been arrested, it is possible, with some exceptions, for him temporarily to procure his liberty by giving a bail bond<sup>1</sup> or entering into a recognizance.<sup>2</sup>

*Distinctions between a Bail Bond and a Recognizance.*

There is considerable resemblance between a bail bond and a recognizance, and the two terms frequently are used interchangeably; but, in their strict sense, there are some distinctions. A bail bond is a new contract, executed by sureties, and sealed, and a separate action must be brought thereon

<sup>1</sup> See, generally, as to bail bonds, 5 Cent. Dig. col. 2125; and, as to recognizances, 42 Cent. Dig. col. 599.

<sup>2</sup> As pronounced by lawyers, the "g" in this word is silent.

for its breach.<sup>3</sup> A recognizance is in the nature of a confession of a conditional judgment in court by the sureties, acknowledging an existing debt, and is entered upon the records,<sup>4</sup> being suspended so long as the principal does or does not do specified acts; but, on his default, the judgment, upon proper proceedings in court, will be made absolute without any new action being brought. A bail bond is a judicial bond, taken while awaiting adjudication of a case by the court, and not after final process; while a recognizance may be taken at any time.

*Parties.*

The sureties on a bail bond are known as "bail." The word "bail" is used also to designate the act of delivering the principal to his sureties.<sup>5</sup> The sureties in a recognizance are known as "recognizers," "cognizers," or "consors."

*Bail—Criminal and Civil.*

Bail may be taken in criminal or civil cases; in the latter case being known as civil or special bail. The object of bail in criminal cases is to secure the appearance,<sup>6</sup> at a designated time and place, of one accused of crime, in order that proper legal steps may be taken toward the disposition of his case. The object of civil bail is to secure, directly or indirectly, the payment of a debt or the performance of some civil duty. Payment by the bail, in a civil case, of the obligation of the principal, discharges him and them; whereas, payment by the bail in a criminal case of the full penalty of their bond, while it releases them, does not free the principal from liability to be brought into court.

<sup>3</sup> Clark's Criminal Law, p. 93.

<sup>4</sup> Clark's Criminal Law, p. 92.

<sup>5</sup> The word "bail" comes from the French word "baller," meaning "to deliver." The word "ballment" comes from the same root; a ballment being a delivery of personal property in trust for some purpose.

<sup>6</sup> Ramey v. Commonwealth, 83 Ky. 534.

**RIGHTS AND LIABILITIES OF BAIL AND RECOGNIZORS  
—IN GENERAL.**

**197. The rights and liabilities of sureties on a bail bond, or on a recognizance, are similar to those of sureties in general.**

The general principles of suretyship apply to bail bonds and recognizances. While the rights and liabilities of sureties thereon differ, in many respects, from those of sureties on a commercial bond, the sureties are entitled, in general, to the same privileges.<sup>7</sup>

*Void Bonds.*

If the bond or recognizance be void, the sureties will not be liable.<sup>8</sup> A bail bond is void if it does not recite a crime against the law;<sup>9</sup> though it is sufficient if it specify an offense in general terms.<sup>10</sup> A recognizance to appear and answer for "being concerned in a row" would not be binding, as an offense is not charged.<sup>11</sup> The sureties, however, will not be discharged by reason of mere technicalities or clerical errors;<sup>12</sup> nor is it any defense that the name of the principal is not stated correctly.<sup>13</sup>

<sup>7</sup> Bail are discharged by a change in their contract. *Bullen v. Dresser*, 116 Mass. 267; *Bean v. Parker*, 17 Mass. 591; *Campau v. Seeley*, 30 Mich. 57; *Commonwealth v. Clay*, 9 Phila. (Pa.) 121; *State v. Sureties*, 4 Wyo. 347, 34 Pac. 3. Or by an extension granted to the principal without their consent. *Rathbone v. Warren*, 10 Johns. (N. Y.) 587; *Willison v. Whitaker*, 7 Taunt. 53, 2 Marsh. 383.

<sup>8</sup> *Haney v. People*, 12 Colo. 345, 21 Pac. 39; *Stafford v. Low*, 20 Ill. 152; *State v. Jones*, 3 La. Ann. 9; *Irwin v. State*, 10 Neb. 325, 6 N. W. 370; *United States v. Goldstein*, 1 Dill. (U. S.) 413, Fed. Cas. No. 15,226.

<sup>9</sup> *Waters v. People*, 4 Colo. App. 97, 35 Pac. 56; *Nicholson v. State*, 2 Ga. 363; *Simpson v. Commonwealth*, 1 Dana (Ky.) 523; *State v. Wooten*, 4 La. Ann. 515; *Horton v. State*, 30 Tex. 191.

<sup>10</sup> *State v. Weaver*, 18 Ala. 293; *State v. Merrilow*, 47 Iowa, 112, 29 Am. Rep. 464; *State v. Tennant*, 30 La. Ann. 852; *People v. Dennis*, 4 Mich. 609, 69 Am. Dec. 338; *State v. Weldeman*, 30 Mo. App. 647; *State v. Birchim*, 9 Nev. 95; *Territory v. Conner* (Okla. 1906) 87 Pac. 591; *United States v. Eldredge*, 5 Utah, 161, 13 Pac. 673.

<sup>11</sup> *State v. Ridgley*, 10 La. Ann. 302.

<sup>12</sup> *Mooney v. People*, 81 Ill. 134; *Territory v. Conner* (Okla. 1906) 87 Pac. 591.

<sup>13</sup> *Commonwealth v. Lamar*, 32 Pa. Super. Ct. 200.

It is not a defense to the sureties that the indictment or information is defective,<sup>14</sup> that the sureties assumed liability before the accused was arrested,<sup>15</sup> that the defendant was taken into custody illegally,<sup>16</sup> that the prosecution of the offense is barred by the statute of limitations,<sup>17</sup> or that the case was not entered upon the docket.<sup>18</sup>

*Deposit in Lieu of Bail.*

Unless a statute authorizes a deposit of money in lieu of bail, such a deposit is illegal,<sup>19</sup> and, if made, cannot be recovered.

**CUSTODY AND SURRENDER OF PRINCIPAL.**

**198. The custody of the principal is committed to the sureties on his bail bond or recognizance, and they have the right to apprehend and surrender him at any time.**

**199. A surrender of the principal to the proper officer will discharge the sureties.**

**ABSENCE OF PRINCIPAL FROM JURISDICTION.**

**200. Sureties on a bail bond or on a recognizance are not discharged from liability by reason of the absence of the principal from the state.**

*Custody and Surrender of Principal.*

Theoretically, when a prisoner is released upon his giving a bail bond or entering into a recognizance, he is in the custody of

<sup>14</sup> *United States v. Manthel*, 2 Alaska, 459; *Harris v. State*, 60 Ark. 209, 29 S. W. 640; *Sharpe v. Smith*, 59 Ga. 707; *Kepley v. People*, 123 Ill. 367, 13 N. E. 512; *Friedline v. State*, 93 Ind. 366; *State v. Morgan*, 124 Mo. 487, 28 S. W. 17; *King v. State*, 18 Neb. 375, 25 N. W. 519; *Lee v. State*, 25 Tex. App. 331, 8 S. W. 277; *State v. Sureties*, 4 Wyo. 347, 34 Pac. 3; *Hardy v. United States*, 71 Fed. 158, 18 C. C. A. 22.

<sup>15</sup> *Hortsell v. State*, 45 Ark. 59; *Vias v. Commonwealth*, 7 Ky. Law Rep. 743.

<sup>16</sup> *Littleton v. State*, 46 Ark. 413.

<sup>17</sup> *United States v. Dunbar*, 83 Fed. 151, 27 C. C. A. 488.

<sup>18</sup> *State v. Spear*, 54 Vt. 503; *King v. Clark*, 5 B. & A. 728.

<sup>19</sup> *Butler v. Foster*, 14 Ala. 323; *Smart v. Cason*, 50 Ill. 195; *Reinhard v. City of Columbus*, 49 Ohio St. 257, 31 N. E. 35.

his sureties,<sup>20</sup> until he is discharged by due course of law, though they would not be allowed actually to confine him. This right to the custody of the principal empowers the sureties, in their discretion, to arrest him without process,<sup>21</sup> and to surrender him<sup>22</sup> at any time<sup>23</sup> to the proper officer,<sup>24</sup> usually to the sheriff. They are allowed to break into his house,<sup>25</sup> if, after demand and refusal, it becomes necessary;<sup>26</sup> and the arrest may be made on Sunday.<sup>27</sup> This right to apprehend the principal allows the sureties to pursue him into another state<sup>28</sup> and to arrest him there.

#### *Arrest by Agent.*

They may designate an agent to make the arrest,<sup>29</sup> or require the assistance of an officer;<sup>30</sup> but, if the arrest is not made in their presence, the authority to the agent should be written,<sup>31</sup>

<sup>20</sup> *Bearden v. State*, 89 Ala. 21, 7 South. 755; *Ramsey v. Coolbaugh*, 13 Iowa, 164; *Reinhard v. City of Columbus*, 49 Ohio St. 257, 31 N. E. 35.

<sup>21</sup> *State v. Lingerfelt*, 109 N. C. 775, 14 S. E. 75, 14 L. R. A. 605; *Taylor v. Taintor*, 16 Wall. (U. S.) 371, 21 L. Ed. 287.

<sup>22</sup> *Parker v. Bidwell*, 3 Conn. 84; *Clark v. Gordon*, 82 Ga. 613, 9 S. E. 333; *Norfolk v. People*, 43 Ill. 9; *Koch v. Coots*, 43 Mich. 30, 4 N. W. 534; *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 145; *Harp v. Osgood*, 2 Hill (N. Y.) 216; *Hughes v. State*, 28 Tex. App. 499, 13 S. W. 777; *Taylor v. Taintor*, 16 Wall. (U. S.) 371, 21 L. Ed. 287.

<sup>23</sup> A forfeiture will not deprive sureties of their right to arrest the principal. *Bearden v. State*, 89 Ala. 21, 7 South. 755; *State v. Lingerfelt*, 109 N. C. 775, 14 S. E. 75, 14 L. R. A. 605.

<sup>24</sup> *State v. Le Cerf*, 1 Bailey (S. C.) 410.

<sup>25</sup> *Read v. Case*, 4 Conn. 166, 10 Am. Dec. 110; *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 146; *Taylor v. Taintor*, 16 Wall. (U. S.) 371, 21 L. Ed. 287.

<sup>26</sup> *Read v. Case*, 4 Conn. 166, 10 Am. Dec. 110.

<sup>27</sup> *Taylor v. Taintor*, 16 Wall. (U. S.) 371, 21 L. Ed. 287.

<sup>28</sup> *Ex parte Lafonta*, 2 Rob. (La.) 495; *Commonwealth v. Brickett*, 8 Pick. (Mass.) 138; *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 146; *State v. Lingerfelt*, 109 N. C. 775, 14 S. E. 75, 14 L. R. A. 605; *Taylor v. Taintor*, 16 Wall. (U. S.) 371, 21 L. Ed. 287.

<sup>29</sup> *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 146. Such agent cannot appoint an agent, though he can employ assistants to act in his presence. *State v. Mahon*, 3 Har. (Del.) 568.

<sup>30</sup> *State v. Cunningham*, 10 La. Ann. 393.

<sup>31</sup> *State v. Lingerfelt*, 109 N. C. 775, 14 S. E. 75, 14 L. R. A. 605; *Taylor v. Taintor*, 16 Wall. (U. S.) 371, 21 L. Ed. 287.

otherwise the principal would be at the mercy of any one who chose to represent that he had authority.

A surrender by one surety will be presumed to be the act of all;<sup>82</sup> or the accused may surrender himself.<sup>83</sup>

*Constructive Surrender.*

Some kinds of constructive surrender will suffice. The delivery of a certified copy of the bond to the proper officer, with instructions to arrest the accused, will be sufficient as soon as he has been arrested,<sup>84</sup> or if he is already in prison, though arrested on another charge.<sup>85</sup> Other forms of constructive surrender will not suffice.<sup>86</sup> Thus, if the sureties should meet the principal and the sheriff in the street when the latter was not in a position to take actual possession of the accused, a direction to the sheriff to take the accused would not discharge the sureties.

*Bail Discharged by Surrender.*

A surrender of the principal before his case is called for trial,<sup>87</sup> operates to discharge the sureties;<sup>88</sup> but, if they have bound themselves to pay a fine imposed against the accused, they cannot free themselves from liability by surrendering him.<sup>89</sup>

*Departure from State.*

Absence from the state is not an excuse for a failure of bail to produce the principal, if they voluntarily have allowed him to leave;<sup>40</sup> nor does it make any difference that the principal is a minor, and has been taken away by his parent.<sup>41</sup>

<sup>82</sup> State v. Doyal, 12 La. Ann. 653.

<sup>83</sup> Babb v. Oakley, 5 Cal. 94; Walton v. People, 28 Ill. App. 645; Dick v. Stoker, 12 N. C. 91.

<sup>84</sup> Sternberg v. State, 42 Ark. 127.

<sup>85</sup> State v. Trahan, 31 La. Ann. 715.

<sup>86</sup> State v. McMichael, 50 La. Ann. 428, 23 South. 992.

<sup>87</sup> Edwards v. Gunn, 3 Conn. 316.

<sup>88</sup> Boswell v. Colquitt, 73 Ga. 63; Kellogg v. State, 43 Miss. 57; Brownlow v. Forbes, 2 Johns. (N. Y.) 101.

<sup>89</sup> State v. Meler, 96 Iowa, 375, 65 N. W. 316; State v. Stommel, 89 Iowa, 67, 56 N. W. 263.

<sup>40</sup> State v. Scott, 20 Iowa, 63; Yarbrough v. Com., 89 Ky. 151, 12 S. W. 143, 25 Am. St. Rep. 524; Harrington v. Dennie, 13 Mass. 93; State v. Horn, 70 Mo. 466, 35 Am. Rep. 437; King v. State, 18 Neb. 375, 25 N. W. 519; Devine v. State, 5 Sneed. (Tenn.) 623; Taylor v. Talntor, 16 Wall. (U. S.) 366, 21 L. Ed. 287.

<sup>41</sup> Starr v. Commonwealth, 7 Dana (Ky.) 243.

**DISCHARGE OF BAIL—IN GENERAL.****201. A discharge of the principal, although erroneous, discharges his sureties.**

If anything occurs entitling the principal to a discharge from custody, the sureties on his bail bond or recognizance are discharged,<sup>42</sup> as they no longer have the right to apprehend him; and it does not make any difference that the discharge of the principal was erroneous.<sup>43</sup>

**DISCHARGE BY PERFORMANCE.****202. Sureties on a bail bond or on a recognizance will be discharged by performance of their contract.***Performance as to Time.*

The sureties on a bail bond or on a recognizance undertake that the principal will appear at a certain time and place, and they will be discharged if the principal so appears; though much depends upon the wording of the bond whether there has been a breach of it or not. If the condition of the bond is that the accused shall appear on a day certain, without more, an appearance on that day is a compliance with the terms of the bond, discharging the bail,<sup>44</sup> though he does not appear afterwards. So, if the condition is that the principal shall appear during a named term of court, and he is in attendance during that term, the bond is complied with, although there has not been any ac-

<sup>42</sup> *State v. Glenn*, 40 Ark. 332; *Lockwood v. Jones*, 7 Conn. 439; *Roberts v. Gordon*, 86 Ga. 386, 12 S. E. 648; *Shields v. Smith*, 78 Ind. 425; *Smith v. Commonwealth*, 91 Ky. 588, 16 S. W. 532; *State v. Wilson*, 14 La. Ann. 450; *State v. Cobb*, 44 Mo. App. 375; *People v. Felton*, 36 Barb. (N. Y.) 429; *Mills v. McCoy*, 4 Cow. 410; *Ledford v. Emerson* (N. C. 1906) 55 S. E. 960.

<sup>43</sup> *Butler v. Bissel*, 1 Root (Conn.) 102; *People v. Hathaway*, 102 Ill. App. 628; *Commonwealth v. Bronson*, 14 B. Mon. (Ky.) 361; *Duncan v. Tindall*, 20 Ohio St. 567.

<sup>44</sup> *Roberts v. Green*, 31 Ga. 421; *Ogden v. People*, 62 Ill. 63; *People v. Kennedy*, 58 Mich. 372, 25 N. W. 318; *Townsend v. People*, 14 Mich. 388; *State v. Mackey*, 55 Mo. 51; *Swank v. State*, 3 Ohio St. 429; *State v. Becker*, 80 Wis. 313, 50 N. W. 178.

tion taken as to his case. If the bond requires the appearance of the defendant at the "next term," he is not required to appear at a special term intervening;<sup>45</sup> but if he appear at the next regular term, and his case is continued, the bond remains in force.<sup>46</sup>

A bail bond usually provides for the appearance of the defendant "to answer the charge,"<sup>47</sup> or "to abide the order of the court," or "from day to day,"<sup>48</sup> or "from term to term,"<sup>49</sup> in which cases the sureties are bound until the defendant is discharged by the court, or surrendered or taken into the custody of the court.<sup>50</sup> If the bond is conditioned that the principal shall not depart without leave of the court until his conviction or acquittal, his sureties are not liable if he escape after a verdict of guilty is rendered.<sup>51</sup> It would be different if the bond provide that he shall abide the judgment of the court;<sup>52</sup> but a mere failure to indict<sup>53</sup> or a quashing of the indictment<sup>54</sup> will

<sup>45</sup> *State v. Aubrey*, 43 La. Ann. 188, 8 South. 440; *State v. Houston*, 74 N. C. 174.

<sup>46</sup> *Stokes v. People*, 63 Ill. 489; *State v. Benzion*, 79 Iowa, 467, 44 N. W. 709; *Rubush v. State*, 112 Ind. 107, 13 N. E. 877; *Ramey v. Commonwealth*, 83 Ky. 534; *People v. Hauaw*, 106 Mich. 421, 64 N. W. 328; *State v. Smith*, 66 N. C. 620; *State v. Breen*, 6 S. D. 537, 62 N. W. 135; *Pickett v. State*, 16 Tex. App. 648.

<sup>47</sup> *Wintersoll v. Commonwealth*, 1 Duv. (Ky.) 177.

<sup>48</sup> *Stokes v. People*, 63 Ill. 489; *Rubush v. State*, 112 Ind. 107, 13 N. E. 877; *People v. Gordon*, 39 Mich. 259; *People v. Millham*, 100 N. Y. 273, 3 N. E. 196; *Allen v. Commonwealth*, 90 Va. 356, 18 S. E. 437.

<sup>49</sup> *Williams v. State*, 55 Ala. 71; *Chase v. People*, 2 Colo. 528; *Gallagher v. People*, 91 Ill. 590; *State v. Whitson*, 8 Blackf. (Ind.) 178; *State v. Baldwin*, 78 Iowa, 737, 36 N. W. 908; *Glasgow v. State*, 41 Kan. 333, 21 Pac. 253.

<sup>50</sup> *State v. Tieman*, 39 Iowa, 474; *Commonwealth v. Coleman*, 2 Metc. (Ky.) 382; *State v. Martel*, 3 Rob. (La.) 22; *Lee v. State*, 51 Miss. 665.

<sup>51</sup> *Roberts v. Gordon*, 86 Ga. 386, 12 S. E. 648; *State v. Wilson*, 14 La. Ann. 440.

<sup>52</sup> *State v. Thompson*, 62 Ind. 367; *State v. Stewart*, 74 Iowa, 336, 37 N. W. 400; *Glasgow v. State*, 41 Kan. 333, 21 Pac. 253; *Neinlinger v. State*, 50 Ohio St. 394, 34 N. E. 633, 40 Am. St. Rep. 674.

<sup>53</sup> *Fleece v. State*, 25 Ind. 384; *Commonwealth v. Roberts*, 4 Metc. (Ky.) 220; *State v. Doane*, 30 La. Ann. 1194; *Jones v. State*, 11 Tex. App. 412.

<sup>54</sup> *State v. Brooks*, 48 La. Ann. 855, 19 South. 739; *State v. Hancock*, 54 N. J. Law, 393, 24 Atl. 726.



not discharge the sureties, though it might be otherwise if the principal had given bail to appear and answer to an indictment.<sup>55</sup> If the principal be indicted for an offense of the same nature as that named in the bond, as an indictment for larceny, the offense having been named as robbery,<sup>56</sup> the liability of the sureties continues;<sup>57</sup> but it would not be so if the principal be indicted for an entirely distinct offense,<sup>58</sup> as, being charged with perjury, he is indicted for burglary.<sup>59</sup>

*Performance as to Place.*

If there is a provision in the bond for the appearance of the defendant at court at a particular place, and the court is moved afterwards without his knowledge, his appearance, in good faith, at the place designated, discharges his bail;<sup>60</sup> or if the bond name a court which has no existence, the bail are not liable for the failure of the principal to appear at another court.<sup>61</sup> However, the liability of bail is not affected by a change of venue<sup>62</sup> legally taken.<sup>63</sup>

<sup>55</sup> *People v. Felton*, 36 Barb. (N. Y.) 429.

<sup>56</sup> *Mudd v. Commonwealth*, 14 Ky. Law Rep. 672.

<sup>57</sup> *Pack v. State*, 23 Ark. 235; *Adams v. Governor*, 22 Ga. 417; *Commonwealth v. Butland*, 119 Mass. 317; *Commonwealth v. Slocum*, 14 Gray (Mass.) 395; *Duke v. State*, 35 Tex. 424.

<sup>58</sup> *People v. Sloper*, 1 Idaho, 158; *Reese v. People*, 11 Ill. App. 346; *State v. Brown*, 16 Iowa, 314; *State v. Forno*, 14 La. Ann. 450; *Draughan v. State*, 35 Tex. Cr. R. 51, 35 S. W. 667.

<sup>59</sup> *Gray v. State*, 43 Ala. 41.

<sup>60</sup> *Hannum v. State*, 38 Ind. 32.

<sup>61</sup> *Sherman v. State*, 4 Kan. 570; *Coleman v. State*, 10 Md. 168. In *Petty v. People*, 118 Ill. 148, 8 N. E. 304, the condition was for the appearance of the defendant at the "criminal court." There was not any court of that designation; but, as the circuit court had exclusive jurisdiction of criminal cases, it was held that the defendant should have appeared there.

<sup>62</sup> *Beasley v. State*, 53 Ark. 67, 13 S. W. 733; *Williams v. McDaniel*, 77 Ga. 4; *State v. Brown*, 16 Iowa, 314; *Commonwealth v. Austin*, 11 Gray (Mass.) 330; *Pearson v. State*, 7 Tex. App. 279. Where the case is transferred by an act of the Legislature, the sureties are not discharged. *Ramey v. Commonwealth*, 83 Ky. 534.

<sup>63</sup> If a change of venue is allowed without authority, the sureties are discharged. *Adams v. People*, 12 Ill. App. (12 Bradw.) 380; *State v. Young*, 20 La. Ann. 397. But the mere grant of an order for a change of venue will not release the sureties, if the change is not taken. *Gray v. Commonwealth*, 100 Ky. 645, 38 S. W. 1092.

**DISCHARGE BY NEW BOND.**

**203. The sureties on a bail bond are discharged if the principal appear and a new bond be taken for his future appearance.**

While the sureties might not be discharged by the appearance of the principal on the first day only of the term, or by any appearance which was not compliance with the terms of the bond, if he do appear, and, before there is any default, a new bond is taken to secure his future appearance, the sureties upon the former bond are discharged from further liability;<sup>64</sup> and this results, although the new bond is invalid, and is set aside.<sup>65</sup>

**ACT OF GOD, ACT OF LAW, AND ACT OF OBLIGEE.**

**204. Sureties on a bail bond or in a recognizance are excused from producing the principal if prevented by the act of God, by the act of law, or by the act of the obligee.**

**DEATH, REARREST, AND ENLISTMENT.**

**205. If the principal die, or if he be rearrested on the same charge, or if he be drafted into the military service, his sureties are excused from producing him.**

While the sureties on a bail bond or in a recognizance are bound unconditionally to produce the defendant, and they are held to a somewhat strict performance of their contract, they will be excused if performance has been rendered impossible by the act of God, or by the act of law,<sup>66</sup> or by the act of the obligee.<sup>67</sup> Death of the principal, being regarded as the act

<sup>64</sup> *Schneider v. Commonwealth*, 3 Metc. (Ky.) 400.

<sup>65</sup> *Peacock v. State*, 44 Tex. 11.

<sup>66</sup> The act of law which will excuse a surety must be one which operates in the state where the obligation was entered into and which binds the officers of that state. *Steelman v. Mattix*, 38 N. J. Law, 247, 20 Am. Rep. 389.

<sup>67</sup> *Talntor v. Taylor*, 36 Conn. 242, 4 Am. Rep. 58; *Steelman v.*

of God, will discharge them.<sup>68</sup> As the obligee in a bail bond or in a recognizance is, usually, the state, the act of the obligee becomes the act of law.

*Act of Law or of the Obligee.*

If a state Legislature enacts that all prior recognizances shall be void,<sup>69</sup> or abolishes the court before which the defendant was to appear,<sup>70</sup> or changes the law so that imprisonment of the defendant would be no longer lawful, the sureties are discharged. Thus, if imprisonment for debt be abolished, civil bail, previously taken, would be discharged, as it would not be lawful for the bail to arrest the principal for the purpose of surrendering him.<sup>71</sup>

*Rearrest.*

The sureties are released by a rearrest of the principal on the same charge,<sup>72</sup> because he is placed in the control of the officer

Mattix, 38 N. J. Law, 247, 20 Am. Rep. 389; *People v. Manning*, 8 Cow. (N. Y.) 297, 18 Am. Dec. 451.

<sup>68</sup> *Pynes v. State*, 45 Ala. 52; *Piercy v. People*, 10 Ill. App. (10 Bradw.) 219; *Griffin v. Moore*, 2 Ga. (2 Kelly) 331; *Wakefield v. McKinnell*, 9 La. 449; *People v. Meyer*, 9 Misc. Rep. 726, 29 N. Y. Supp. 1148; *Walsh v. Schulz*, 13 Daly (N. Y.) 132; *Mt. Pleasant Bank v. Pollock*, 1 Ohio, 35; *Conner v. State*, 30 Tex. 94. Sureties will be excused, although the death of the principal occurs after a forfeiture. *State v. Cone*, 32 Ga. 663; *Mather v. People*, 12 Ill. 9; *Woolfolk v. State*, 10 Ind. 532; *State v. McNeal*, 18 N. J. Law, 333; *People v. Wissig*, 7 Daly (N. Y.) 23. But not if bail fixed. *State v. Scott*, 20 Iowa, 63; *Hamilton v. Dunklee*, 1 N. H. 172; *Olcott v. Lilly*, 4 Johns. (N. Y.) 407; *Rawlings v. Gunstern*, 6 Term. R. 284. If the surety has paid after a forfeiture, the subsequent death of the principal will not entitle him to recover the money paid. *People v. Rich*, 36 App. Div. 60, 56 N. Y. Supp. 277.

<sup>69</sup> *Doniphan v. State*, 50 Miss. 54.

<sup>70</sup> *Taylor v. Taintor*, 16 Wall. (U. S.) 366, 21 L. Ed. 287.

<sup>71</sup> *Frey v. Hebenstreit*, 1 Rob. (La.) 561; *Brown v. Dillahunty*, 4 Smedes & M. (Miss.) 713, 43 Am. Dec. 499; *White v. Blake*, 22 Wend. (N. Y.) 612; *Parker v. Sterling*, 10 Ohio, 357; *Kelly v. Henderson*, 1 Pa. 495.

<sup>72</sup> *State v. Jones*, 29 Ark. 127; *Smith v. Kitchens*, 51 Ga. 158, 21 Am. Rep. 232; *State v. Orsler*, 48 Iowa, 343; *Medlin v. Commonwealth*, 74 Ky. (11 Bush) 605; *People v. Stager*, 10 Wend. 431; *Peacock v. State*, 44 Tex. 11. Sureties will not be released by the arrest of the principal on another charge. *Ingram v. State*, 27 Ala. 17; *Havis v. State*, 62 Ark. 500, 37 S. W. 957; *Hartley v. Colquitt*,

of the law precisely as he would had the bail surrendered him.<sup>73</sup> So where, during the Civil War, a certain region having been placed under martial law, a federal military officer, after the accused had been released on a recognizance entered into a state court, arrested, removed, and imprisoned the principal, his sureties were excused from producing him at the state court.<sup>74</sup>

In order, however, that another arrest of the principal shall operate as a discharge of his sureties by being the act of law or of the obligee, it is requisite that such new arrest shall be within the same jurisdiction where the obligation was assumed.<sup>75</sup> If the principal be arrested and imprisoned in another state, his sureties remain liable; <sup>76</sup> for, in the eyes of the law, he was in the custody of the sureties, and it was through their negligence that he was allowed to depart.<sup>77</sup> If, however, the state in which the bond was entered into has permitted the accused to be extradited, his sureties are discharged.<sup>78</sup>

#### *Enlistment.*

The voluntary enlistment of the principal in the military service will not release his bail,<sup>79</sup> although it is otherwise if the enlistment be involuntary.<sup>80</sup>

72 Ga. 351; *Brown v. People*, 26 Ill. 28; *State v. Merrihew*, 47 Iowa, 112, 29 Am. Rep. 464; *People v. Robb*, 98 Mich. 397, 57 N. W. 257; *Bishop v. State*, 16 Ohio St. 419; *Wheeler v. State*, 38 Tex. 173.

<sup>73</sup> *State v. Holmes*, 23 Iowa, 458; *Commonwealth v. Coleman*, 2 Metc. (Ky.) 382.

<sup>74</sup> *Commonwealth v. Webster*, 1 Bush (Ky.) 616.

<sup>75</sup> See note 66, *supra*.

<sup>76</sup> *Ingram v. State*, 27 Ala. 17; *State v. Scott*, 20 Iowa, 63; *Withrow v. Commonwealth*, 1 Bush (Ky.) 17; *Harrington v. Dennie*, 13 Mass. 93; *Kling v. State*, 18 Neb. 375, 25 N. W. 519; *Devine v. State*, 5 Sneed (Tenn.) 623; *Taylor v. Taintor*, 16 Wall. (U. S.) 366, 21 L. Ed. 287.

<sup>77</sup> *Taintor v. Taylor*, 36 Conn. 242, 4 Am. Rep. 58; *Yarbrough v. Commonwealth*, 89 Ky. 151, 12 S. W. 143, 25 Am. St. Rep. 524; *State v. Horn*, 70 Mo. 466, 35 Am. Rep. 437.

<sup>78</sup> *People v. Moore*, 4 N. Y. Cr. R. 205; *State v. Allen*, 21 Tenn. (2 Humph.) 258; *Reese v. United States*, 9 Wall. (U. S.) 13, 19 L. Ed. 541.

<sup>79</sup> *Gingrich v. People*, 34 Ill. 448; *Winninger v. State*, 23 Ind. 228; *State v. Scott*, 20 Iowa, 63; *State v. Reaney*, 13 Md. 230; *Harrington v. Dennie*, 13 Mass. 93. See, also, *Huggins v. People*, 39 Ill. 241.

<sup>80</sup> *Belding v. State*, 25 Ark. 315, 99 Am. Dec. 214, 4 Am. Rep. 26; *Alford v. Irwin*, 34 Ga. 25.

**FORFEITURE.**

**206. Upon failure of the principal, without legal excuse, to appear at the time and place named, his sureties become liable for the penalty, and it is not any defense that the principal subsequently appears; but the court, in its discretion, can set a forfeiture aside.**

If the principal makes default by not appearing in accordance with the terms imposed, the sureties at once become liable for the penalty named in their obligation.<sup>81</sup> When the liability of the sureties is made absolute after default, the bail is said to be "fixed."

It is not any defense to the sureties that the principal subsequently surrenders himself,<sup>82</sup> or is surrendered by his sureties,<sup>83</sup> or is arrested,<sup>84</sup> tried, and convicted.<sup>85</sup> Neither does a pardon, subsequently granted, affect the liability.<sup>86</sup> All of these matters are independent of the fact that the sureties have not performed their contract, and have become, thereby, liable for the penalty.<sup>87</sup>

*Setting Aside Forfeiture.*

It is, however, discretionary with the court to set aside the forfeiture; <sup>88</sup> and usually it will be set aside where it is tech-

<sup>81</sup> *New Haven Bank v. Miles*, 5 Conn. 587.

<sup>82</sup> *Hangsleben v. People*, 89 Ill. 164; *State v. Emily*, 24 Iowa, 24; *Sproat v. Commonwealth*, 4 Ky. Law Rep. 629; *State v. McGuire*, 16 R. I. 519, 17 Atl. 918; *Lee v. State*, 25 Tex. App. 331, 8 S. W. 277.

<sup>83</sup> *People v. Bartlett*, 3 Hill, 570; *State v. Warren*, 17 Tex. 283.

<sup>84</sup> *Brown v. People*, 26 Ill. 28; *State v. Martin*, 50 La. Ann. 1157, 24 South. 590; *Reed v. Police Court*, 172 Mass. 427, 52 N. E. 633; *People v. Bennett*, 136 N. Y. 482, 32 N. E. 1044.

<sup>85</sup> *Walker v. Commonwealth*, 79 Ky. 292.

<sup>86</sup> *Dale v. Commonwealth*, 101 Ky. 612, 42 S. W. 93. A pardon, before conviction, is a defense if the principal accepts. *Grubb v. Bullock*, 44 Ga. 379.

<sup>87</sup> *Weatherwax v. State*, 17 Kan. 427; *Mount v. Commonwealth*, 2 Duv. (Ky.) 95; *State v. Davidson*, 20 Mo. 212, 61 Am. Dec. 603.

<sup>88</sup> *Chase v. People*, 2 Colo. 481; *Russell v. State*, 45 Ga. 9; *State v. Traphagen*, 45 N. J. Law, 134; *People v. Tubbs*, 37 N. Y. 586; *Baker v. State*, 21 Tex. App. 359, 17 S. W. 256. An appeal does not lie from the decision of the court in regard to remitting a forfeiture.

nical only and justice seems to require it, as where there was not any intent to evade the law.<sup>80</sup> The entry of an order showing a release from liability is known as an "exoneretur." In event of the sickness<sup>80</sup> or insanity<sup>81</sup> of the defendant, which prevents his appearance, the court will set aside a forfeiture, especially if the defendant appears as soon as he recovers. However, a forfeiture will not be set aside until the costs actually have been paid,<sup>82</sup> as they constitute a distinct liability.<sup>83</sup>

After a remission of the forfeiture, the parties stand in the same position as they did previous to the forfeiture; the duty remaining upon the sureties to comply with the conditions, as before, for the appearance of the principal.<sup>84</sup>

*People v. Bennett*, 136 N. Y. 482, 32 N. E. 1044; *Commonwealth v. Oblender*, 135 Pa. 536, 19 Atl. 1057; *Bross v. Commonwealth*, 71 Pa. 262. Unless the court has abused its discretion. *People v. Hobbs*, 46 Ill. App. 208; *State v. Kraner*, 50 Iowa, 582; *State v. Denny*, 10 La. Ann. 335; *Barton v. State*, 24 Tex. 250.

<sup>80</sup> *McArdle v. McDaniel*, 75 Ga. 270; *Wray v. People*, 70 Ill. 664; *People v. Baer* (Com. Pl.) 7 N. Y. Supp. 660; *People v. Deery*, 6 Daly (N. Y.) 493.

<sup>80</sup> Sickness of the surety is not a defense, if the principal has not appeared. *People v. Meehan*, 14 Daly (N. Y.) 333.

<sup>81</sup> In some states the sureties are excused, if the principal has been adjudged insane and confined in a hospital. *Commonwealth v. Fleming*, 15 Ky. Law Rep. 491; *Fuller v. Davis*, 1 Gray (Mass.) 612. Contra, *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 48.

<sup>82</sup> *Ward v. Colquitt*, 62 Ga. 267; *People v. Smith*, 43 Ill. App. 217.

<sup>83</sup> *State v. Beebee*, 87 Iowa, 636, 54 N. W. 479; *Commonwealth v. Ramsay*, 2 Duv. (Ky.) 385; *Commonwealth v. Shick*, 61 Pa. 495; *Chambliss v. State*, 20 Tex. 197.

<sup>84</sup> *State v. Cornig*, 42 La. Ann. 416, 7 South. 698.

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## APPENDIX.

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A good lawyer always should protect the interests of his client, provided he does not work injustice to others. When a lawyer is employed to draw up a bond, he has it in his power to make it more advantageous for one party than for the other, such as by inserting express conditions to overcome those implied by law. If he is employed by both parties, he should endeavor to make the contract as advantageous to one as to the other, and give to each a copy thereof.

Suppose the employé of a bank be required to give a bond. The employé might be instructed to furnish it, or the attorney of the bank might draw up the bond, and call in the employé and his sureties to execute it. In the former case, the employé and the sureties do not wish to incur any greater risk than necessary; in the latter, the bank desires that the sureties shall not have any excuse for escaping liability.

To illustrate the difference that easily might be made in such a case, the following forms are given, the first giving the bond presented by the employé; the latter, the one drawn in the interests of the bank.

### *Form of Bond Protecting Interests of Sureties.*

KNOW ALL MEN BY THESE PRESENTS, That we, Guy Guernsey, as principal (hereinafter designated as the principal), and William B. Walrath and Clinton S. Woolfolk, as sureties (hereinafter designated as the sureties), all of the city of Chicago, in the county of Cook, and state of Illinois, are bound severally and respectively unto the Calumet Trust & Savings Bank, a corporation of the state of Illinois, in said city of Chicago (hereinafter designated as the bank), in the sum of five thousand (\$5,000.00) dollars each,<sup>1</sup> good and lawful money

<sup>1</sup> While this provision gives the bank security to the extent of \$10,000, it prevents either one of the co-sureties from being called



of the United States, to be paid to the said bank, its successors or assigns, for which said several payments, well and truly to be made, each of us does hereby bind himself, severally and respectively, but not jointly, nor one for the other. Sealed with our seals, and dated this first day of July, 1907.

Whereas, the above-bounden Guy Guernsey has been chosen and appointed teller of the said bank, by reason whereof he will receive or have control or be chargeable with money, property, or other things of the bank and of others:

Now, therefore, the condition of this obligation is such that if the principal, his executors or administrators, well and truly shall serve the bank as such officer during his continuance in office, within the term for which he has been chosen, and well and truly perform and discharge his duties as such officer, and at the end of his said office, or whenever sooner thereto required upon request to him or to them made, shall make and give unto the bank, or to its agent or attorney, a just and true account of all money, property, and other things as shall come into his possession or control or charge as such officer, and shall pay and deliver over to his successor in office, or to any other person duly authorized to receive the same, all such balances or sums of money, property, or other things of value which shall appear to be in his hands, or chargeable to him, and due and deliverable by him to the bank, then this obligation to be void; otherwise, to remain in full force and virtue.

This bond is made, issued, delivered, and accepted upon the following additional conditions which are agreed to by the bank, and which are to be construed as conditions precedent to the liability of the sureties hereunder, and must be performed,<sup>a</sup> faithfully and fully, before any claim under this bond can be enforced against the sureties:

Neither of the sureties shall be liable unless all of the obligors and the obligee herein named shall execute this bond.<sup>b</sup>

The sureties shall not be liable if the principal, at any time upon to pay more than one-half of that sum. The sureties should enter into a written contract with each other in regard to contribution, providing for sharing equally any sums either may be required to pay on account of this obligation. See ante, c. VII, note 38.

<sup>a</sup> See ante, § 125.

<sup>b</sup> This gives constructive notice of the condition. See ante, § 42.

previous to the delivery of this bond, was known by the bank, or by its officers, to be a defaulter,<sup>4</sup> or to have been guilty of any acts which would indicate that he was not of good character.

The sureties shall not be liable for any acts of the principal which do not amount to larceny, embezzlement, or fraud as an employé as to property or funds in his personal possession or control; nor for any fund reported as being in possession of the principal unless such sum shall be actually in his possession; nor for any defaults occasioned by making good prior defaults of the principal.<sup>5</sup>

The liability of the sureties shall terminate at once, if the duties of the principal are changed,<sup>6</sup> or if additional duties<sup>7</sup> are imposed upon him other than those which may arise naturally from a growth of the business of the bank; or if the capital stock of the bank be increased; or if its charter expire by limitation or otherwise; or if any reduction be made in the salary of the principal, or in the method of ascertaining the same;<sup>8</sup> or if his compensation be paid to him in advance,<sup>9</sup> or unreasonably withheld; or if the services of the principal are discontinued for any cause,<sup>10</sup> except for such reasonable time as may

<sup>4</sup> This condition would be implied by law. See ante, § 54. But, as the parties are not lawyers, it is better to insert many of the implied conditions, so that there may be no misunderstanding on these points.

<sup>5</sup> In the absence of this express provision, the sureties would be liable for a default arising from the application by the principal of funds in his possession to pay a previous shortage. See ante, c. V, note 354.

<sup>6</sup> See ante, c. V, notes 177 and 407, as to the effect, on the liability of the sureties, of a change in the duties of the principal.

<sup>7</sup> In the absence of an express provision, the sureties would be discharged, in any event, if the added duties of the principal were sufficient to interfere with the proper performance of the duties covered by the bond. See ante, c. V, note 179.

<sup>8</sup> See ante, c. V, note 181, as to changes affecting the principal's compensation.

<sup>9</sup> See ante, c. V, note 173.

<sup>10</sup> In the absence of any stipulation on this point, the liability of the sureties for any subsequent acts of the principal would cease the instant the services of the principal were discontinued for any cause. See ante, c. V, note 208.

be given to him each year for a vacation; or if the principal shall die, and claim, in writing, of any amount due from the principal's estate, shall not be presented to the sureties within sixty days after his death.<sup>11</sup>

Either of the sureties shall have the right to terminate his liability on this bond by giving sixty days' notice, in writing, to the bank, and the sureties shall not be liable for anything that may occur after the expiration of sixty days from the time such notice shall be received by the bank.<sup>12</sup>

The liability of each of the sureties shall terminate within sixty days after either of them becomes insane, or shall die, or after proceedings shall be instituted to have either of them declared a bankrupt;<sup>13</sup> and if, for any reason, one of the sureties shall be discharged, the other shall be discharged likewise.

The sureties shall not be liable unless an examination of the accounts of the principal shall be made at least once in every three months by an expert accountant;<sup>14</sup> and if the principal shall gamble, or become intoxicated, and this fact be known to the bank, or to its officers, prompt notice thereof shall be given in writing to each of the sureties.<sup>15</sup>

If the principal defaults in the performance of his duties, notice thereof, in writing, shall be given to each of the said sureties within thirty days after such default is known to the bank or to its officers; and the liability of the sureties as to future defaults shall terminate as soon as the bank or its officers

<sup>11</sup> In the absence of a provision requiring a prompt presentation of claims against the sureties, the obligee, legally, might wait any length of time short of the statute of limitations. See ante, § 98.

<sup>12</sup> This stipulation is very important; otherwise, in the absence of an actual default known to the obligee, the sureties would be liable indefinitely. See ante, § 111.

<sup>13</sup> In the absence of this stipulation, the entire burden of a default might be thrown on one of the sureties.

<sup>14</sup> This keeps a check on the principal. In the absence of some such provision, the obligee would not be required to examine the principal's accounts, although there might be a by-law of the corporation requiring periodical examinations to be made. Such by-laws are held to be for the benefit of the stockholders, and not for the benefit of the sureties. See ante, c. V, note 364.

<sup>15</sup> Such information will enable the sureties to investigate; and, if deemed advisable, they can give notice to terminate their liability as provided in a preceding paragraph.

have knowledge of a default by the principal.<sup>16</sup> In event of a default, the bank agrees to have criminal proceedings instituted promptly against the principal,<sup>17</sup> and to exhaust the principal, if solvent, or any security which it may hold, before resorting to the sureties;<sup>18</sup> and the sureties shall be given prompt notice if the bank institutes any suit against the principal. The sureties shall have ninety days after receiving notice of such default within which to make settlement therefor with the bank; and they may set off or recoup, against any claim by the bank arising under this bond, any claim or claims which the principal and the sureties, or either of them, or any two of them, may have against the bank.<sup>19</sup> Suit shall not be brought against the sureties until after demand, in writing, has been made on them by the bank.

If the principal has given or shall give any other bond or bonds to the bank, and the principal commits a default which renders the sureties thereon and the sureties on this bond liable, the sureties on this bond shall be liable for such default only in proportion which the penalty of this bond bears to the total penalties of all the bonds.

Upon settlement of any claim against the sureties under this bond, the bank shall assign to the sureties all claims or rights of action which the bank has against the principal.<sup>20</sup>

Guy Guernsey. (Seal.)

William B. Walrath. (Seal.)

Clinton S. Woolfolk. (Seal.)

Calumet Trust and Savings Bank, (Seal.)

By Edmund Burke, President.

*Form of Bond Protecting Interests of Obligee.*

KNOW ALL MEN BY THESE PRESENTS, That we, Lewis F. Fell, as principal (hereinafter designated as the princi-

<sup>16</sup> This would be implied by law. See ante, § 116.

<sup>17</sup> This acts as a check on the principal, and thus protects the sureties.

<sup>18</sup> In the absence of this provision, the obligee could proceed first against the sureties, without resorting to any security it might hold. See ante, § 96.

<sup>19</sup> See ante, § 148, as to counterclaims.

<sup>20</sup> See ante, c. V, note 835, as to assignment to surety of claims against the principal.

pal), and Charles A. Thatcher, Daniel E. Brong, and Edward F. Raymond, as sureties (hereinafter designated as the sureties), all of the city of New York, in the county of New York, and state of New York, are held and firmly bound unto George H. Frost, Adelbert E. Rice, and Erwin F. Lapham, copartners under the name and style of G. H. Frost & Co., transacting a general banking business in said city of New York (hereinafter designated as the obligees), in the sum of ten thousand (\$10,000.00) dollars, gold coin of the United States of the standard weight and fineness, to be paid to the said obligees, their heirs, executors, administrators, or assigns, for which payment, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, jointly and severally, and every two or more and each of them jointly and severally,<sup>21</sup> firmly by these presents.

Sealed with our seals, and dated this first day of July, 1907.

Whereas the above-bounden Lewis F. Fell has been chosen and appointed teller for the obligees, by reason whereof he will receive or have control, or be chargeable with money, property, or other things of the obligees or of others:

Now, therefore, the condition of this obligation is such that if the principal, his executors or administrators, well and truly shall serve the obligees as such officer so long as he shall continue in said office, whether for the present term for which he has been appointed or for any other or of any succeeding term to or for which he may be appointed, whether continuous or not,<sup>22</sup> and well and truly perform and discharge all of his duties as such officer, and at the expiration of his said office, whether for the present term or for any other or succeeding term, or whenever sooner thereto required, upon request to him or them made, shall make or give unto the obligees, or to their agent or attorney, a just and true account of all moneys, property, and other things as shall have come into his possession or

<sup>21</sup> In the absence of this provision, while the obligees might sue any one of the obligors severally, or all of them jointly, an action against more than one and less than all could not be maintained.

<sup>22</sup> If the principal is appointed for a specified term, the sureties would not be liable after that term, in the absence of an express stipulation making them liable for subsequent terms. See c. V, note 803.

control or charge as such officer, and shall pay and deliver over to his successor in office, or to any other person duly authorized to receive the same, all such balances or sums of money, property, or other things which shall appear to be in his hands or chargeable to him, and due or deliverable by him to the obligees, then this obligation to be void; otherwise, to remain in full force and virtue.

This bond is executed, delivered, and accepted with the understanding that the liability of the sureties is not affected by reason of any failure of the obligees to disclose any information they or either of them may possess in regard to the reputation, habits, or past acts of the principal,<sup>23</sup> and is subject to the following additional stipulations:

The sureties shall be liable for all prior defaults of the principal existing at the time this bond is given, whether known to the obligees or not,<sup>24</sup> as well as for all defaults occurring at any time hereafter, and for all defaults which may be made to cover prior defaults.<sup>25</sup>

The sureties are to be liable for any loss resulting to the obligees through the principal, whether such loss results from the dishonesty of the principal, from his negligence, or from his errors in judgment; <sup>26</sup> and the liability of the sureties shall extend to any losses of funds or property of the obligees in the possession or control of the principal, although such loss may arise from fire, theft, robbery, or burglary, without any fault or negligence on the part of the principal,<sup>27</sup> and to all losses sustained by the obligees which arise through the default of the principal

<sup>23</sup> See ante, § 54.

<sup>24</sup> The general rule is that sureties are not liable for any default occurring prior to the delivery of the instrument, unless an intention to become so liable is shown clearly. See ante, § 124.

<sup>25</sup> The sureties would be liable in this case without an express provision. See ante, c. V, note 354.

<sup>26</sup> If sureties are to be held liable for losses arising through errors in judgment by the principal, it is much better to have this clearly appear; otherwise, there may be some question about it. See ante, c. V, note 436.

<sup>27</sup> The sureties for a private officer are not liable, impliedly, for any losses resulting from fire, larceny, robbery, burglary, or a bank failure, if the principal has been free from negligence, though it is otherwise as to the sureties of a public officer. See ante, § 188.

in connection with other persons, and to all losses to which the acts or negligence of the principal shall have contributed, as well as to such acts as result from the acts or negligence of the principal alone.

The sureties shall remain liable although the capital or volume of the business may be increased, or the scope and methods of the business of the obligees be changed; and shall remain liable for the principal after any change in the membership of said copartnership of G. H. Frost & Co.,<sup>28</sup> whether arising from death, or the withdrawal of or from an addition of a partner or partners, or from any other cause, so long as the firm name continues as at present, and the sureties shall be liable to the members of such new partnership for any acts of the principal to the same extent as they would have been to the present members if there had not been any change; and the liability of the sureties can be enforced by the obligees, or by the survivor or survivors of them, for their own use, or for the use of those who were members of the firm at the time the default of the principal occurred, or for the use of those who are members at the time the action may be brought, or such action may be brought in the name or names of such members themselves, as they may elect. The use of the word "obligees" in this bond shall be taken to apply also to those who may seek, under this paragraph, to enforce the liability of the sureties.

The obligees shall have the right to change<sup>29</sup> or add<sup>30</sup> to the duties of the principal, or change the place of performance of his duties;<sup>31</sup> and the sureties shall be liable for any defaults as to such different or added duties to the same extent as they are for his present ones.

The liability of the sureties shall not be affected by any

<sup>28</sup> The general rule is that sureties are not liable after any change has occurred in the number of the obligees. See ante, § 117.

<sup>29</sup> Unless there is a stipulation in regard to making changes in the duties of the principal, the sureties would not be liable for any duties outside of the scope of the employment as set out in the recital. See ante, c. V, notes 177 and 405.

<sup>30</sup> See ante, c. V, note 179.

<sup>31</sup> In the absence of an express provision, it might be questionable whether the sureties would be liable for any duties performed elsewhere than in the place of original employment. See ante, c. V, notes 187 and 411.

change in the compensation of the principal, or in the manner of ascertaining the same,<sup>32</sup> or in the time of paying same,<sup>33</sup> or by a discontinuance of the services of the principal for any time less than one year; but if the principal, for any cause, shall cease at any time to be employed by the obligees, but shall be re-employed by them within one year from the time any such employment ceased, the liability of the sureties on this bond shall be the same as if the employment of the principal had been continuous and without interruption.<sup>34</sup>

The liability of the sureties shall not be affected if the obligees take a new bond from the principal, unless the obligees expressly agree to terminate the liability of the sureties upon this bond;<sup>35</sup> nor shall the liability of the sureties be affected by any release, surrender, relinquishment, or loss of any property or security, of any kind, of the principal or of others, or of rights or remedies against them or any of them, which the obligees may have at any time;<sup>36</sup> nor shall the liability of any of the sureties be affected by a release, directly or indirectly, of either or of both the other sureties.<sup>37</sup>

The sureties waive notice of all defaults of the principal, and consent to remain liable for all future defaults of the principal as long as he may be continued in the employment of the obligees, whether his defaults may be known to the obligees or not, and whether notice of defaults are given to the sureties or not.<sup>38</sup>

<sup>32</sup> See ante, c. V, note 182.

<sup>33</sup> See ante, c. V, note 173.

<sup>34</sup> Generally, the liability of sureties terminates the instant the principal's employment ceases for any cause, although he is re-employed subsequently. See ante, c. V, notes 298 and 304.

<sup>35</sup> As to the effect, upon the liability of sureties, of the obligee taking a new bond, see ante, c. V, note 348. The new bond is supposed to be cumulative, but a doubt might arise.

<sup>36</sup> The general rule is that sureties are released, if the obligee relinquishes or loses securities, to the extent of the value of the securities so relinquished or lost. See ante, § 127.

<sup>37</sup> Generally a release of one co-surety releases the others proportionately. See ante, c. V, note 644.

<sup>38</sup> After a default by the principal, known to his employer, the liability of the sureties is terminated at once as to all future defaults, unless they consent to remain bound; but as to the default already



In event of a breach of this bond, the obligees shall not be required to proceed against the principal,<sup>39</sup> nor against his estate, and the liability of the sureties shall not be affected, in any way, by their failure to do so.

If the principal shall be or shall become a defaulter, any release,<sup>40</sup> discharge, or settlement with the principal, which does not result in full payment in cash<sup>41</sup> by him of any loss sustained by the obligees, shall not affect the rights of the obligees against the sureties; nor shall the liability of the sureties be affected by any extension or extensions of time for settlement or for payment given to the principal at any time.<sup>42</sup>

The sureties hereby covenant and agree to save the obligees harmless from any acts of the principal, and that the obligees shall not be liable or subject to loss;<sup>43</sup> and, in event of a suit being brought on this bond, the obligees can recover as damages, in addition to any actual loss they may have sustained, directly or indirectly, up to the time judgment is rendered, interest on the same at the highest rate allowed by law;<sup>44</sup> and their reasonable attorney fees;<sup>45</sup> and the defendants in any such suit shall not have the right to set off or recoup any claim, except such as may be possessed by the principal and sureties jointly.<sup>46</sup>

committed the sureties remain liable without notice, unless they have stipulated therefor. See ante, § 116.

<sup>39</sup> Unless there are statutory provisions to the contrary, the obligees would not be required to proceed, first, against the principal. See ante, § 96.

<sup>40</sup> A release of the principal, without the consent of the sureties, releases the latter. See ante, § 132 (c).

<sup>41</sup> Generally, giving a negotiable instrument is treated as payment. See ante, c. V, note 591.

<sup>42</sup> An extension of time granted to the principal, without the consent of the sureties, would discharge the latter. See ante, § 108.

<sup>43</sup> This provision would enable the obligees to bring suit against the sureties before being called upon to make payment on account of some default by the principal. See ante, c. V, note 439. Generally, to obtain substantial damages, the obligees must have suffered an actual loss; and it would not be sufficient that they were liable to loss.

<sup>44</sup> Interest is recoverable at the legal rate in any event, even though the added interest swells the amount of damage beyond the penalty named in the bond. See ante, § 145.

<sup>45</sup> See, as to attorney fees, ante, c. V, note 740.

<sup>46</sup> See, as to counterclaims, ante, § 148.

After the obligees shall have recovered a judgment against the principal and sureties, either jointly, or against any one or more fewer than all, the sureties shall not be obliged to satisfy such judgment out of the property of the principal before resorting to the property of the sureties, but may satisfy such judgment out of the property of any one or more of the defendants as the obligees may elect.

Lewis F. Fell. (Seal.)  
Charles A. Thatcher. (Seal.)  
Daniel E. Brong. (Seal.)  
Edward F. Raymond. (Seal.)

State of New York, }  
County of New York. } ss.

I, Robert L. Lane, a notary public in and for the county and state aforesaid, do hereby certify that Lewis F. Fell, Charles A. Thatcher, Daniel E. Brong, and Edward F. Raymond, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official notarial seal this first day of July, 1907.

Robert L. Lane, Notary Public.

Here note the addresses of the sureties and make a schedule of their assets.

The three parts of a bond can be observed in the above forms: First, the penal or obligatory part, which provides for the payment of money. Should the bond end here, it would be an ordinary obligation for the payment of money. Next comes the recital, setting forth the circumstances under which the bond is given, and the reason therefor; and, lastly, the conditional part, or defeasance, providing that, upon the performance of certain acts named, the bond shall be void. The bond is broken by a failure to comply with the conditions named; and, upon showing that fact, the liability of the sureties is established.

The following is a form for a continuing guaranty to protect the creditor:

*Form for Continuing Guaranty to Protect Creditor.*

For and in consideration of one dollar <sup>47</sup> (the receipt whereof is acknowledged hereby), to us in hand paid by the Puritan Banking Company, a corporation of the state of Massachusetts, we hereby guaranty, absolutely and unconditionally at all times, unto the said Puritan Banking Company the payment of any balance of indebtedness <sup>48</sup> of Edwy L. Reeves, of the city of Boston, state of Massachusetts, to the said Puritan Banking Company, to an amount not exceeding five thousand (\$5,000.00) dollars, whether such indebtedness now exists, or is incurred hereafter, and in whatever form it may be evidenced.

We hereby waive notice of acceptance of this guaranty, <sup>49</sup> and all notices of the amounts advanced hereunder, and all notice of defaults <sup>50</sup> by the said Edwy L. Reeves, and consent to any extensions <sup>51</sup> of the time of payment of said indebtedness, or of any portion thereof, and to any change in form or renewal, at any time, of such indebtedness, or of any evidence thereof, taken by the said Puritan Banking Company.

This guaranty shall continue, at all times, to the amount of five thousand (\$5,000.00) dollars, regardless of the amounts received \* and paid by the said Edwy L. Reeves, until a written notice, revoking the same, shall be received by the said Puritan Banking Company, and shall bind us jointly and severally, and our heirs, executors, and administrators.

In event of the death of either or of both of us, we hereby

<sup>47</sup> See ante, § 50, as to adequacy of consideration.

<sup>48</sup> See ante, c. IV, note 71. This indicates clearly that the guaranty is a continuing one, and that the guarantor is liable for an unpaid balance regardless of the volume of the transactions between creditor and the principal.

<sup>49</sup> See ante, § 37 (g), as to the necessity of notice of acceptance.

<sup>50</sup> See ante, § 99 (b), as to the necessity of notice to the guarantor, of the principal's default, where the time of payment and the amount is not certain.

<sup>51</sup> An extension of the time of performance, granted to the principal by the creditor without the consent of the guarantor, would discharge the latter. See ante, § 108.

\* See c. V, note 147.

bind our heirs, executors, and administrators, until knowledge of such death shall reach the said Puritan Banking Company.<sup>52</sup>

In witness whereof, we have hereunto set our hands and seals at the city of Boston, in the state of Massachusetts, on the first day of July, 1907.

Arthur S. Peebles. (Seal.)

Rawson Redman. (Seal.)

The following form is for a limited guaranty of collection to protect the guarantor against greater liability than he actually intended to assume:

*Form for Guaranty of Collection to Protect Guarantor.*

Ann Arbor, Mich., July 1, 1907.

Mr. George W. Underwood, Detroit, Mich.:

Mr. Hamilton Hunt, of this place, goes to your city this week to buy goods. We guaranty the collection<sup>53</sup> of the price of any goods which you may sell to him on this trip,<sup>54</sup> on sixty days' time,<sup>55</sup> not exceeding five hundred dollars in amount.

Alling & Hammill, by Charles Alling.

<sup>52</sup> See ante, § 119, as to the effect on a guaranty of the death of the guarantor.

<sup>53</sup> A guarantor of collection is not liable unless the principal is shown to be financially irresponsible. See ante, § 126.

<sup>54</sup> This qualification makes it clear that the guaranty is intended to be noncontinuing. See ante, § 25.

<sup>55</sup> The guarantor will not be liable if there be any deviation from the exact terms prescribed by him. See ante, c. V, note 191.



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